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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALMAS BROTHERS SHIPPING, S.A.
AND
VALSKY MARITIME, LTD.,
Petitioners

v.

JACK FISHER, ETC.
AND
EUGENIA KEPESSIDIS, Individually, Etc.,
Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether, as the decision of the panel below held, a single call to pick up cargo in an American port—by a foreign vessel owned and operated by Greek citizens, flying the Greek flag, carrying a Greek crew, and directed solely out of Greece—establishes a substantial base of operations in the United States as required by the Court's decision in *Hellenic Lines, Limited v. Rhoditis,* 398 U.S. 306, reh. den. 400 U.S. 856 (1970), before American law is applicable to injuries and deaths of foreign seamen in American ports.*

2.

Whether, as the panel below held, American law is to be applied to injury/death claims by foreign seamen employed by foreign shipowners aboard foreign flag vessels under a contract providing for the application of foreign law by a foreign seaman on the vessel's only call in an American port to pick up cargo solely because the injury/death occurred in an American port.**

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* Former Chief Judge John R. Brown, for himself and *seven* of his fellow Circuit Judges, in dissenting from the refusal by the Court below to rehear this case *en banc,* said in part:

> ". . . The panel's reliance on *Rhoditis* is misplaced, first, because I believe that some of the findings of the panel with respect to defendants' purported 'base of operations' in the United States simply have no support in the record, and second, and much more significant for purposes of en banc consideration, because I am convinced that the panel's opinion misinterprets the holding of *Rhoditis* and applies a legal standard contrary to the law of this Circuit." 636 F.2d 1107, at 1108; App. p. 30.

** In *Lauritzen v. Larsen,* 345 U.S. 571 (1953), the Court held even doing "more or less frequent and regular business" within the United States is not enough "to bring a foreign transaction between

II

3.

Whether by judicial decree the public policy of the United States for compensating injury/death claimants is to be substituted for the public policy of both the seamen's and the shipowner's own foreign country simply because the injury/death fortuitously occurs within the United States.

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foreigners in foreign ports under American law." 345 U.S. at 590. And in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Court reiterated this rule when the cause of action arose in an American port:

> ". . . To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous, but also an unduly speculative burden, disruptive of international commerce and without basis in expressed policies of this country. The amount and type of recovery (for injury/death) which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury." (Parenthetical expression added). 358 U.S. 354, at 384 (1959).

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below and, additionally, all parties and persons believed to be interested in the outcome of this Petition;

1. Eugenia Kepessidis, wife of decedent Dimitrios Kepessidis, individually and as personal representative of the Estate of Dimitrios Kepessidis;
2. Kosmas Kepessidis, minor son of Eugenia Kepessidis;
3. Kosmas Kepessidis, father of decedent Dimitrios Kepessidis;
4. Mrs. Olga Kepessidis, mother of decedent Dimitrios Kepessidis;
5. Jack Fisher, as personal representative of the Estate of Dimitrios Kepessidis, deceased;
6. Counsel for all of the above named parties;
7. Valmas Brothers Shipping, S.A., operator of the M/V AGIOS NICOLAOS V;
8. Valsky Maritime, Ltd., owner of the AGIOS NICOLAOS V;
9. The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), underwriter at interest for the AGIOS NICOLAOS V and its owners.

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UNITED STATES STATUTES

46 U.S.C. § 688 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on October 10, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 628 F.2d 308 and is printed in the separate Appendix filed with this Petition, *infra* p. 1.* The Order of the United States Court of Appeals

* The Appendix also contains all of the evidence dealing with base of operations.

for the Fifth Circuit denying the Petition for Rehearing En Banc and the opinion of seven Circuit Judges dissenting from the refusal to rehear the case en banc are reported at 636 F.2d 1107, and are printed in the Appendix at page 27. Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of Texas are printed in the Appendix at page 53. The Judgment of the United States District Court for the Eastern District of Texas is set forth in the Appendix at page 72. The order of the United States District Court for the Eastern District of Texas of November 28, 1977, retaining jurisdiction and denying Defendant's Motion to Decline Jurisdiction is in the Appendix at page 48.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 10, 1980. A timely Petition for Rehearing En Banc was filed and Rehearing En Banc was denied, seven judges dissenting, on January 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Respondents' alleged application of the Jones Act, 46 U.S.C. § 688, which provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the

death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

This is an action for damages for the death of a Greek seaman, Dimitrios Kepessidis, who was killed in a boiler explosion aboard the Greek vessel AGIOS NICOLAOS V on June 1, 1976, in Beaumont, Texas, against his Greek employers.

Dimitrios Kepessidis was a life-long resident and citizen of Greece. He had been employed by Valmas Brothers Shipping, S.A. as a Chief Engineer. He agreed to work for Valmas by signing an employment contract in Piraeus, Greece, which incorporated the terms of the Collective Agreement between his labor union and Greek shipowners, and was thereafter flown to Beaumont, Texas, where he joined the vessel on May 22, 1976. He was killed in a boiler explosion aboard the vessel in Beaumont, Texas, on June 1, 1976.

The AGIOS NICOLAOS V had recently been purchased by Valsky Maritime, Ltd., the owning company, from a Swedish company. Prior to its call in Beaumont, the ship underwent repairs and general maintenance in a shipyard in Cadiz, Spain, where most of the crewmembers, all of whom were Greek, joined the ship.

The AGIOS NICOLAOS V was on its first voyage for Valsky. The voyage began in Cadiz, Spain. From there the ship sailed to Beaumont, Texas, to load grain at Continental Grain Elevator. After loading the grain, she proceeded to the Soviet Union to discharge her cargo.

The AGIOS NICOLAOS V was and is a ship registered in Greece, flying the Greek flag. The ship is owned by Valsky Maritime, Ltd. (hereafter Valsky). The ship is operated by Valmas Brothers Shipping, S.A. (hereafter Valmas) from Piraeus, Greece. All the stock of both the shipowner Valsky and the ship operator Valmas is owned by three brothers, Nicholas Valmas, Christothis Valmas and Dimitris Valmas, all of whom are citizens and residents of Greece. All of the officers of both Valsky and Valmas are the same three brothers. Christothis Valmas has never been in the United States. One of his brothers once visited the United States as a tourist, and another visited some relatives in the United States. Neither company has any officers, agents or employees in the United States. Their ships are not advertised in the United States. Under Greek law, 75% of the crew must be Greek. The company gives preference to hiring Greek seamen. All of the officers are Greek. All employees of all companies live in Greece. Both companies are managed from Greece. Neither Valsky nor Valmas owns any property in the United States. All directors of both companies are Greek citizens. No citizen of the United States is employed by either Valsky or Valmas. The AGIOS NICOLAOS V was on its maiden and only voyage to the United States at the time of the accident.

Prior to the trial the District Court had overruled Petitioners' motion to dismiss this action wholly between

Greek nationals, but did not rule on the choice of law issue until the trial on the merits. At trial the District Court held American law and not Greek law applicable and awarded damages under American law to the seaman's surviving beneficiaries.

Petitioners respectfully submit the Courts below erred in holding the American law to be applicable and in retaining jurisdiction of the action wholly between Greek nationals.

REASONS FOR GRANTING THE WRIT

1.

As stated succinctly by former Chief Judge Brown in dissenting for himself and six of his fellow Circuit Judges from the refusal of the Court below to rehear the case en banc:

> ". . . the panel's opinion is contrary to the law of this Circuit and of the Supreme Court."

A. CONFLICTS WITH THE DECISIONS OF THE COURT

In both holding American law applicable and retaining jurisdiction the decision below is in direct conflict with the decisions of the Court in:

Lauritzen v. Larsen, 345 U.S. 571 (1953)

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)

Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 (1970)

This trilogy of cases delineates eight factors to be considered in determining whether American law is applicable to an injury/death of a foreign seaman on a foreign vessel. Only the place of the accident in the United States points to the application of American law in this case. This alone is not enough as *Romero* specifically held on this "narrow issue" that "the amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury."[1] 358 U.S. at 384. The panel below concedes that the place of injury in the United States alone is not enough. 628 F.2d at 317, footnote 17.

In *Lauritzen,* the first of the trilogy, the Court listed six factors other than the place of the injury which were to be considered, all of which require the application of Greek law to this case:

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1. The basic reason behind this rule was stated by the Court to be:

> "Discussing the significance of the place of the wrongful act, we pointed out in Lauritzen that '[t]he test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate . . . the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag.' 345 U.S. at 583, 584. Although the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws, such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations. To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country." 358 U.S. at 383-384.

	This Case
1. Law of flag	Greece
2. Allegiance of injured .	Greece
3. Allegiance of shipowner	Greece
4. Place of the contract ..	Greece. Contract of employment made Union contract applicable which provided for injury/death claims to be governed by Greek law and to be adjudicated in Greek courts.
5. Foreign remedy available	Yes, in Greece[2]
6. Law of the forum	Is not to be imposed on foreign shipowners "just because local jurisdiction of the parties is obtainable." 348 U.S. at 591.

Once again, the panel below conceded these six other factors required the application of Greek law and dismissal.

The panel below then turned to *Rhoditis* in which the Court added the seventh factor to be considered—the shipowners base of operations. In *Rhoditis,* American law was held applicable in a suit for the death of a Greek seaman who was killed in New York against his Greek

2. In footnote 15, page 272, the panel apparently gives some credence to plaintiffs' claim that a Greek forum is not available to the plaintiffs. The plaintiffs' Greek law expert (also counsel for plaintiffs in this case) testified they could have received compensation under Greek law 551 or elect to proceed in tort in Greece (T/P pp. 78-80). Defendants' legal expert also testified that the plaintiffs had these remedies available in courts of Greece (Domvros Depo. p. 21).

shipowner employer because the Greek shipowning corporation had an "extensive business operation" in the United States, with its largest office in New York and another in New Orleans. The Greek citizen who owned more than 95% of the stock in the shipowning corporation was a U.S. domiciliary who had lived in the United States for 25 years and managed the shipowning corporation from New York.

That the Greek shipowners in this case had no such substantial base of operations in the United States is established by the uncontradicted evidence in this case.[3]

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3. This is easily demonstrated:

Rhoditis	*This Case*
1. Ninety-five percent of the stock in this Greek corporation which really owned the vessel belonged to two alien residents of the United States, a father and his son. The father had been a lawful permanent resident alien since 1952. Operation of the vessel was by Hellenic Lines, a Greek Corporation, with the same ownership.	1. All of the stock of Valsky, the shipowning corporation, and Valmas, the operating corporation, are owned by the three Valmas brothers, all Greek citizens and all lifelong residents of Greece. One brother has never been to the United States, one came on one occasion as a tourist and the third came on one occasion to visit relatives in 1950. (App. pp. 82, 83, 100).
2. Both the shipowning corporation and the operating corporation were managed by the father and the principal base of operations for both corporations was in New York City. The operating corporation also has an office in New Orleans.	2. The shipowning corporation has an office in Monrovia, Liberia but is managed and operated from Greece. The operating corporation is managed and has its principal base of operations in Greece and all orders to the vessel are sent from Piraeus. (App. p. 89). Neither has any officers, directors or even employees in the United States. (App. p. 92). Their ships are not advertised in the United States. (App. p. 90). On a ship to ship basis, the operating cor-

The completely unfounded conclusory assertions by the panel below that the vessel had "a substantial base of operations" in the United States were initially made by the Plaintiffs, blindly accepted by the Trial Court, and then by the panel below. No page reference citations to the record where the evidence on which these unfounded conclusory assertions are based has ever been given by the Plaintiffs, by the Trial Court or by the panel below. Indeed they have given none because none exists. In the dissent from the refusal of the Court below to rehear the case en banc, the importance of such omissions is succinctly stated:

> "It is significant that neither the District Court nor the panel made any finding to the effect that defendant corporations or any individuals having anything to do with their direction and control had their principal—or indeed, any—place of business in the United States. Nor was there any finding that the expenses of the vessel were paid in the United States,

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poration may hire a protecting agent in the United States to handle any problems the vessel may have while in port. (App. pp. 92, 93).

3. The vessel was engaged in regularly scheduled runs between various Gulf ports of the United States and ports in the Middle East and all of the vessel's income was from cargo either originating or terminating in the United States ports.

3. The vessels of the Valmas brothers do not have any regular scheduled runs to or from ports in the United States. (App. p. 88). They are what are called "tramp vessels"—ones who take their cargo from and to ports anywhere in the world as they are directed to do by those who charter the vessel. The vessel involved in this case was on its maiden and only voyage to the United States prior to the accident.

> or that the actual management of the vessel was from a United States office, or that any of the stockholders of the defendants were United States citizens or residents. Indeed, no finding was even made that defendants maintained any offices in the United States or were even affiliated with any organization that had offices or operations in the United States." 636 F.2d at 1109.

No such findings could be made because the undisputed evidence in the record establishes as a matter of law that no such operations or activities were carried on by these Defendants in the United States. One would have thought that at a minimum the Defendants were entitled to have the name of the alleged town, city, village or hamlet from which they were allegedly operating stated.

The holding of the panel below that the Defendants had a substantial base of operations in the United States is clearly and directly in conflict with the Court's holding on this issue in *Rhoditis* and it is respectfully submitted that the Petition for a Writ of Certiorari should be granted to resolve this conflict.

B. CONFLICTS WITH THE DECISIONS OF THE COURT BELOW

The decision of the panel below is also in direct conflict with at least three decisions of the Court below. As do all vessels when they call in American ports, the Defendant shipowners either had or utilized the services of a husbanding or protecting agent in the United States on a ship to ship basis to handle any problems while the vessel was in an American port with the agency terminating upon the departure of the vessel. Three decisions of other panels of the Court below have categorically held

that the employment of husbanding or protecting agents such as the one utilized by the Defendants on the vessel's only call to an American port does not constitute a "substantial base of operations" as contemplated by *Rhoditis*:

1. In *Merren v. A/S BORGESTED*, 519 F.2d 82 (5th Cir. 1975) the Court below held that a defendant who had no offices in the United States and was not affiliated with any organization in the United States except to hire a shipping agent who contracted in American ports for the use of the ship's services did not thereby establish a base of operations in the United States under *Rhoditis*.

2. In *Avila v. M/V TOLUCA*, 636 F.2d 1107, 1112 (5th Cir., May 30, 1980)[4] the Mexican shipowner did 30% of its shipping business in and out of United States ports and the vessel on which the seaman was killed in an American port had made "Ninety-seven visits to American ports for the period 1973 through August 15, 1975" (636 F.2d at 1113), which was the two and one-half year period immediately prior to the accident made the basis of the action. Held: The Mexican shipowner did not have a substantial base of operations in the United States under *Rhoditis*.[5]

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4. As the opinion had not been published at the time of the denial of rehearing en banc, the seven dissenting judges in the Court below published it as an appendix to their dissenting opinion.

5. When the panel decision in this case is applied together with the decision in *Avila*, apparently the rule of law in the Fifth Circuit would be something like this: A foreign shipowner on the maiden voyage of its foreign flag vessel using only a husbanding agent thereby establishes on this one call to an American port a substantial base of operations in the United States under *Rhoditis*, but if it continues to operate its vessels in and out of the United States using only such husbanding agents, at some time between the maiden voyage and the 97th voyage of its vessel to the United States, the foreign shipowner's activities in the United States no longer constitute a substantial base of operations within the meaning of *Rhoditis*.

3. In *Nunez-Lozano v. Oivind Lorentzen Rederi*, 634 F.2d 135 (5th Cir., December 5, 1980), the Court below reaffirmed the holding of *Merren* that the employment of shipping agents in the United States by a foreign shipowner is "insufficient to constitute 'base of operations'" (634 F.2d at 137) in the United States under *Rhoditis*.

4. In *Tamboris v. Kainis Compania Maritima, S.A.*, 439 F.2d 1131 (5th Cir. 1971) no *Rhoditis* base of operations was found because no American citizens or residents owned any part of the shipowning corporation directly or indirectly. While the number of calls made in American ports does not appear in the opinion, even if only one such call was made, the decision of the panel below conflicts because no American ownership exists in this case either.[6]

It is particularly significant that although *Merren*, *Tamboris* and *Avila* were all decided prior to the panel decision in this case, and all were cited to the panel (even *Avila* which was rendered after oral argument but four months before the rendition of the decision by the panel below), the panel did not cite any of these four cases nor attempt to distinguish them in any way. As none of them is distinguishable by even the wildest imagination, and as a panel alone cannot overrule prior decisions of other panels of the Court below as this can

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6. As the dissenting opinion on denial of rehearing so aptly states it:

"The substantially identical facts in *Merren*, *Tamboris* and most particularly *Avila* (to which must be added *Nunez-Lozano*), on the one hand and those in the instant case cannot justify the rejection of American law in those three (four) while allowing it here. To conclude otherwise is to permit decision of this very significant question of law to be determined, not by principles, but by an unguided fact finding." (Parenthetical expressions added). 636 F.2d at 1111.

be done only by the Court en banc under its own rules, to reach the result they desired, the panel had to completely ignore these three cases.

While one would normally expect a Court of Appeals to maintain consistency in its own decisions required by Rule 35(2) of the Federal Rules of Appellate Procedure, the supervisory powers of the Court clearly are such that it not only can, but should act to correct such a blatant disregard of their judicial obligations by those who declined to resolve this conflict upon rehearing en banc.[7]

2.

The decision of the panel below is also in direct conflict with the decisions of the Courts of Appeals for the Second, Third and Fourth Circuits on what activities of a foreign shipowner in the United States are sufficient to establish a substantial base of operations under *Rhoditis*. This can be quickly demonstrated:

Second Circuit: Koupetoris v. Konkar Intrepid Corp., 535 F.2d 1392 (2nd Cir. 1976). The foreign vessel called seven times at U.S. ports in 1974, the year of the injury to the foreign seamen. Even though the foreign shipowner's husbanding agent in New York drew on the shipowner's bank account in New York to pay the vessel's expenses,

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7. Indeed it would be appropriate under the All Writs Act, 28 U.S.C.A. § 1651, for a writ of mandamus to be issued to the Court of Appeals below directing them to hear and resolve this conflict by rehearing en banc, but such an extraordinary (and distasteful) remedy is not necessary since the Court can accomplish the same purpose by granting the Petition for a Writ of Certiorari and remanding it with directions if it does not conclude it should hear the case.

to forward funds to the vessel's master and even appointed husbanding agents for the vessel in other U. S. ports. Held: the shipowner's base of operations was Athens, Greece. 535 F.2d at 1396.[8]

Third Circuit: De Mateos v. Texaco, Inc., 562 F.2d 895 (3rd Cir. 1977). The foreign shipowner was a wholly owned subsidiary of an American Corporation and its vessels regularly called at ports in New Jersey, Pennsylvania and Delaware. Held: No base of operations in the United States because "the vessel's base of operations, if it was not Panama, was London where TOT performed the management services that in the *Rhoditis* case were performed by Mr. Callimanopoulos in New York." 562 F.2d at 902.

Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240 (3rd Cir. 1980). The foreign vessel was owned by a corporation incorporated under the laws of Delaware and maintained an export sales office in New York. The properties

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8. Illustrative of the types of and extent of the necessary contacts to meet the *Rhoditis* test is:

Antypas v. Cia. Maritima San Basilio, S.A., 541 F.2d 307 (2nd Cir. 1976). The foreign vessel was owned by a Panamanian corporation whose stock was owned by American citizens. The vessel was managed by a general agent in New York. The vessel was operated on regular liner service between the United States and Europe and the United States and the Far East. The vessel was under the direct control of the New York agent, and the vessel's earnings were collected in New York and expenses were paid from New York. The vessel advertised for business in the United States, listing agents in various United States ports and the general agent in New York. Held: These contacts established a substantial base of operations under *Rhoditis* sufficient to require application of American law. None of these contacts by the Greek shipowners are present in this case.

and corporate headquarters of the shipowner were in Venezuela and approximately one-third of the shipowner's oil production in Venezuela was exported to the United States. Held: These activities in the United States did not establish a substantial base of operations under *Rhoditis*. 613 F.2d at 1246.

Fourth Circuit: Morewitz v. Andros Compania Maritima, S.A., 614 F.2d 379 (4th Cir. 1980). The foreign vessel was owned by a Panamaian corporation which during the period from April through October, 1973, called at various American ports. Held: No substantial base of operations under *Rhoditis*.

Fitzgerald v. Liberian S/T CHRYSSI P. GOULANDRIS, 582 F.2d 312 (4th Cir. 1978). In the month of June, 1974, the vessel made two calls to the port of Boston, Massachusetts and one to Philadelphia, Pennsylvania. Held: "The vessel's major base of operations is not in the United States." 582 F.2d at 315.

While all of these cases do not indicate whether the vessels involved had a husbanding agent while in American ports, there can be no doubt that each of them required such an agent if for no other reason than to provide the services necessary for the vessels to clear for entry and departure from the United States with United States Customs Offices, Immigration Offices, and the United States Public Health Service, and to handle any other problems which might occur while the vessels were in American ports.

The foregoing cases which involved many more calls in American ports by the vessels of the shipowners involved than the single call of Greek shipowner's vessel in this case all held not to establish a substantial base of operations in the United States under *Rhoditis*. The decision of the panel below directly conflicts with each of these decisions from the Courts of Appeals for the Second, Third and Fourth Circuits and the Petition for a Writ of Certiorari should be granted to resolve this conflict.

3.

The Petition for a Writ of Certiorari should be granted because the decision of the panel below presents this very important question of public policy:

> Whether by judicial decree the public policy of the United States for compensating injury/death claimants is to be substituted for the public policy of the home country of both the foreign seaman and foreign shipowner simply because the injury/death fortuitously occurs within the United States.

The decision of the panel below judicially decrees for the first time that the fortuitous circumstance of an injury/death in the United States is all that is required to make the entire American system of compensating seamen injury/death claimants applicable to foreign seamen employed by foreign shipowners aboard foreign flag vessels.[9]

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9. As the dissent on refusal to rehear en banc reflects, former Chief Judge Brown's own survey of the Circuit Court cases did not reveal any

> ". . . case which has held that the mere fact that a vessel called regularly at a United States port is sufficient to satisfy the 'substantial base of operations test' of Rhoditis." 636 F.2d at 1110.

The panel below fell into such a grievous error in substantial part because of its failure to comprehend the rule to be applied in personal injury/death case involving foreign seamen on foreign vessels which was first enunciated by the Court in 1885 in *The Belgenland v. Jensen*, 114 U.S. 355. In *The Belgenland* the Court expressly recognized two different rules to be applied in determining whether American admiralty courts should retain jurisdiction of a suit between two foreign parties. As to ship collision cases, those involving the *commonis juris*, that is, the common law of nations (normally involving vessels from two different foreign countries flying two different foreign flags, neither of whom could claim his own country's laws should be applied), the Court established the rule that an American court should retain jurisdiction unless special circumstances existed to show that justice would be better subserved by declining it. 114 U.S. at 367.

But the Court also recognized that an entirely different rule should be applied with respect to those actions involving internal matters aboard a vessel such as claims made by members of a foreign vessel's crew against their foreign shipowner employer. As to these internal matters, the Court held jurisdiction should not be retained as American admiralty courts should "not interfere between the parties in such cases unless there is a special reason for doing so."[10] The attempts by the panel below to avoid

10. In more detail the Court said:
". . . the case of foreign seamen is undoubtedly a special one when they sue for wages under a contract which is generally strict in its character and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the shipowners as well as those of master and crew, as well as when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign sea-

this clear holding of the Court by implying that *The Belgenland* rule with respect to the internal affairs of a foreign vessel and its foreign owner does not apply where a choice of law question exists simply will not do. This rule established in *The Belgenland* relating to the internal affairs of a vessel was reaffirmed and reiterated in the exact context in which it is presented in this case by the Court in *Lauritzen*. Labeling it as "settled American doctrine," the Court said:

> ". . . As this Court held in United States v. Flores, *supra* (289 U.S. at 158), and iterated in Cunard S.S. Co. v. Mellen, *supra* (262 U.S. at 123):
>
> > 'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require . . .'" 345 U.S. at 582.

In *Lauritzen*, the seaman's employment contract expressly provided that Danish law and the contract with the Danish union were to control seamen's injury/death claims against the Danish shipowner. The same contractual situations exist in this case. The employment contract executed by the Greek seamen in Piraeus, Greece expressly made the Collective Agreement between the

---

men sue the master of their ship for ill-treatment. On general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so . . ." 114 U.S. at 364.

Union of Greek Shipowners and the Panhellenic Seamen's Federation applicable to the decedent's employment aboard the vessel. The union agreement introduced by the Plaintiffs in the Trial Court expressly provides in unequivocal terms that any claim arising out of the seamen's employment is to be determined exclusively by Greek law and Greek courts:

> "SOLUTION OF INDIVIDUAL DISPUTES
>
> 1. Individual contracts of employment, on which the present collective agreement applies, will be governed exclusively, as to any claim arising out of seamen's employment, including claims on account of illness or accident, by the provisions of the present collective agreement and Greek law, being judged exclusively by the competent Greek authorities and Greek law courts, resort to any foreign courts and to any foreign law being prohibited and expressly ruled out." (Collective Agreement, page 22 of English translation)

In further reaffirming the rule of *The Belgenland* with respect to such internal matters aboard foreign vessels, the Court said:

> ". . . Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an

> express provision it would probably have been implied. The Belgenland, 114 U.S. 355, 367, 29 L.ed. 152, 156, 5 S.Ct. 860: The Hanna Nielson (DC NY) 273 F. 171 . . ." 345 U.S. at 588-589.

The far-reaching implications of the panel's decision to replace the public policy of Greece with the public policy of the United States insofar as seamen's injury/death claims against Greek shipowners by Greek citizens is concerned is a startling and unwarranted deviation from this settled American doctrine.

The concern of the dissenting judges below that such a change in the public policy of the United States would open the floodgates of litigation with no substantive principles to guide the lower courts is fully warranted, and particularly so in view of what the dissenting judges recognized as America's "renowned largess for humanity."

Any such substantial change in the public policy of the United States should be left to the Congress as the Court emphasized in *Lauritzen* when importuned to adopt the same public policy as the panel below as a means of benefitting foreign seamen:

> "We are not sure that the interest of this foreign seaman, who is able to prove negligence, is the interest of all seamen or that his interest is that of the United States. Nor do we stop to inquire which law does whom the greater or the lesser good. The argument is misaddressed. It would be within the proprieties if addressed to Congress." 345 U.S. at 593.

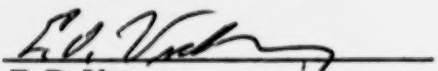
The Petition for a Writ of Certiorari should be granted to prevent the substantial change made by the panel below in the public policy of the United States with respect to

the compensation of foreign seamen's injury/death claims which occur within the boundaries of the United States.

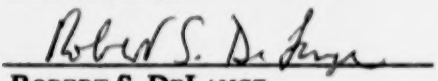
CONCLUSION

Petitioners respectfully submit that the Court should grant a writ of certiorari and reverse the decision of the panel below.[11]

Respectfully submitted,



E. D. VICKERY



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11. Once the determination of the choice of law issue is properly resolved and the Greek law held applicable, dismissal under *The Belgenland and Lauritzen* rule that jurisdiction should not be retained "unless there is a special reason for doing so" becomes clear. All of the eyewitnesses are Greek seamen, whose depositions had to be taken in Greece. The testimony of the three American witnesses (none of whom was aboard the vessel at the time of the accident) is available for use in Greece from the trial transcript. Such dismissal should be made without prejudice to the rights of the Plaintiffs to assert any claims they may have in Greece. Defendants expressly agree (1) to post the same financial security guaranteeing the payment of a judgment in this case in the U.S. in Greece, and (2) not to assert any defense based on a time limitation in the Greek law, provided such claims are asserted in Greece within six months (or such other time period the Court might select) after the Court's judgment becomes final.

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari and three copies of the Appendix have been served on all parties required to be served, i.e., on Respondents, by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record in accordance with Rule 28.3, as follows: Mr. Paul Dué, of Dué, Dodson & deGravelle, 442 Europe Street, Baton Rouge, Louisiana, 70802 and Mr. Frank A. Adams, of Adams & Adams, 1205 San Jacinto Building, Beaumont, Texas, 75951, on the 28th day of April, 1981.

E. D. VICKERY

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FILED
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CLERK

80-1810

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALMAS BROTHERS SHIPPING, S.A.
AND
VALSKY MARITIME, LTD.,
Petitioners

v.

JACK FISHER, ETC.
AND
EUGENIA KEPESSIDIS, Individually, Etc.,
Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX 1

Jack FISHER, Personal Representative of the Estate of Dimitrios Kepessidis,
Plaintiff-Appellee,

v.

The AGIOS NICOLAOS V et al.,
Defendants-Appellants.

Eugenia KEPESSIDIS, Individually, etc., et al., Plaintiffs-Appellees,

v.

The AGIOS NICOLAOS V, etc., et al.,
Defendants-Appellants.

No. 79-1103.

United States Court of Appeals,
Fifth Circuit.

Oct. 10, 1980.

Surviving widow and dependents of a Greek seaman who was killed on a foreign vessel in an American port brought wrongful death action under the Jones Act and under general maritime law. The United States District Court for the Eastern District of Texas, Joe J. Fisher, J., held that the Liberian corporation which owned the vessel and the Panamanian corporation which operated the vessel were liable, and they appealed. The Court of Appeals, Tate, Circuit Judge, held that: (1) the trial court properly exercised discretion when it denied a motion to dismiss on forum non conveniens grounds; (2) despite defendants' strong case for the application of Greek law, where the fatal accident occurred in an Ameri-

can port and where the seaman who was killed had worked in that American port during his entire service on the vessel prior to the accident and the vessel derived substantial revenues from a substantial base of operations in the United States, there was a sufficient nexus between the defendants and the United States to justify application of United States law; (3) the district court's finding that the vessel had a substantial base of operations in the United States and derived substantial revenues from that base of operations was not clearly erroneous; (4) any error that might have been committed by the district court in calculating damages for loss of future earnings was harmless; and (5) the district court did not abuse discretion when it awarded prejudgment interest at a rate of nine percent.

Affirmed.

Robert S. DeLange, Galveston, Tex., E. D. Vickery, Houston, Tex., for defendants-appellants.

Dué, Dodson & DeGravelles, Paul H. Dué, Baton Rouge, La., for Eugenia Kepessidis.

Appeal from the United States District Court for the Eastern District of Texas.

Before MORGAN, CHARLES CLARK and TATE, Circuit Judges.

TATE, Circuit Judge:

The surviving widow and dependents of a Greek seaman killed on a foreign vessel in an American port were awarded damages in this wrongful death action, which was brought under the Jones Act and general maritime

law. The defendants held liable (the shipowner Valsky, a Liberian corporation, and the ship operator Valmas, a Panamanian corporation) contend principally that the district court erred (a) in failing to grant a motion for dismissal based on forum non conveniens, (b) in applying United States rather than Greek law, and (c) by incorrectly computing the damage award. We find no reversible error and therefore affirm the judgment of the district court.

FACTS

The decedent, Dimitrios Kepessidis, a citizen of Greece, was hired in Greece as the chief engineer for the M-V AGIOS NICOLAOS V and joined the vessel in Beaumont, Texas, on May 22, 1976.

The AGIOS NICOLAOS V is a Greek flag-flying and Greek registered vessel owned by defendant, Valsky Maritime, Ltd. (Valsky), a Liberian corporation. It is operated by the defendant Valmas Brothers Shipping, S.A. (Valmas), a Panamanian corporation.[1] The vessel, which had recently been purchased from a Swedish vendor, was the only ship owned by Valsky. The AGIOS NICOLAOS V had sailed to Beaumont (on its maiden voyage under Valsky) without any cargo. Its first business venture (and only one prior to the accident) was to pick up corn at a Beaumont grain elevator and to deliver it to the Soviet Union.

On June 1, 1976, Chief Engineer Kepessidis, who had only nine days earlier joined the crew of the AGIOS

1. The two corporate defendants were owned and operated entirely by three brothers, Nicholas Valmas, Christothis Valmas, and Dimitris Valmas, all of whom were citizens and residents of Greece.

NICOLAOS V, had gone to help one of the crew start the engine boilers. They were unsuccessful in three attempts. On the fourth attempt, the boiler exploded, and the decedent was burned. Despite being injured, the decedent proceeded to fight the fire, but the fire extinguisher he used was not in working order. In a further attempt to extinguish the blaze, members of the crew turned on the carbon dioxide system. In doing so, however, no one took a head count, and Chief Engineer Kepessidis was trapped in the engine room, where he suffocated from the carbon dioxide.

[1-3] We should here note that the defendants do not attack the district court's findings that the decedent's accident and death resulted from the unseaworthiness of the vessel[2] and the negligence of the defendants.[3] While

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2. The district court found that the defendants' vessel and its equipment were unseaworthy in that the starboard auxiliary boiler had a defective leaking fuel valve and defective equipment, in that the boiler was having to be operated and attempted to be ignited on a manual basis when the equipment was designed to be automatic but which automatic features had broken down and had not been repaired despite reasonable opportunity for such repair, in that the boiler was not equipped with an adequate sight glass or other safety device to accord an operator a reasonable opportunity to inspect the furnace for possible leaking fuel oil, in that the controls, operations manuals, etc., were all in Swedish rather than Greek, and in that the crew was not given proper training and instructions in the proper and safe method to operate these automatically designed boilers in a manual fashion. The court properly found that this unseaworthiness proximately caused the accident resulting in the death of the late Mr. Kepessidis.

3. The district court found: The defendants were negligent in failing to assure that all fire extinguishers were functioning properly, in failing to see that proper fire drill procedures occurred aboard ship, in resorting to the Co^2 system when it was unnecessary to do so, and in causing the Co^2 system to be activated before any reasonable steps were taken to ascertain that all engine room personnel had reached safety. The defendants were likewise negligent in that no attempt was made to use fire resistant clothing to reach the engine

a contention is made that the decedent's own negligence may have been a contributory cause, the trial court's finding to the contrary is far from being clearly erroneous[4] so as to justify our upsetting it on review.[5]

ISSUES

On appeal, the defendants-appellants raise the following principal issues: (1) Whether the trial court erred in retaining jurisdiction of this suit (a forum non conveniens contention); (2) If jurisdiction were properly retained, whether the district court erred in applying American law rather than Greek law; and (3) Whether

---

room to cut off the fuel supply for the fire and to rescue any persons located in the engine room. This negligence caused or contributed to the death of the late Mr. Kepessidis. The defendants were also negligent in causing or permitting the various unseaworthy conditions as set forth to exist and in failing to provide plaintiffs' decedent with a safe place to work, which negligence proximately caused the accident resulting in the death of Mr. Kepessidis.

4. The defective leaking valve caused a residue of gas to build up after each unsuccessful attempt to ignite the boiler. Relying on expert evidence that the decedent should have allowed a minute or two to elapse (so as to allow the gas to dissipate) after each unsuccessful attempt, the defendants contend that the decedent's fault contributed to the accident. We find no error in the district court finding that the decedent could not have reasonably known of the defect so as to take such precaution and did not act without reasonable care for his own safety under the circumstances; as well as its conclusion that the decedent's relatively minor burns would not have resulted in his death, which was due to carbon dioxide suffocation brought about by the negligence (bordering on gross) of the defendants.

5. The district court's findings of fact in an admiralty case are binding unless clearly erroneous. Fed. R. Civ. Proc., Rule 52(a). In a judge trial of an admiralty claim, questions of negligence and proximate cause are treated as fact questions and a finding of fact of the trial court on these issues will not be overturned on review unless clearly erroneous. *Marcona Corporation v. Oil Screw Shifty III*, 615 F.2d 206, 208 (5th Cir. 1980), *S. C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 166 (5th Cir. 1979).

the damages were properly computed, in that (a) the award of future loss of earnings was not discounted to present value and (b) pre-judgment interest was improperly allowed (or, alternatively, at the wrong rate).

I. *Forum Non Conveniens*

The defendants' motions in the trial court did not dispute its jurisdiction of these maritime claims, nor that court's discretion in determining whether the action before it should be conditionally dismissed on forum non conveniens grounds that the Greek courts were a more suitable forum. As we apprehend their argument before us, the ultimate contention of the defendants is that the district court abused its discretion in not dismissing the suit because, in their view, the court was in error under the *Lauritzen* test (see text at note 7 *infra*) in determining that American law applied.

The fountainhead decision in determining application of the forum non conveniens principle is *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), a non-maritime case. There the Court stated that "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." 330 U.S. at 507, 67 S.Ct. at 842. The doctrine "presupposes at least two forums in which the defendant is amenable to process . . . [and] furnishes criteria for choice between them." *Id.* Although "the combination and weight of factors requisite to given results are difficult to forecast or state," 330 U.S. at 508, 67 S.Ct. at 843, among the factors of "private interest" listed by the Court were accessibility of proof and witnesses, enforceability of any resulting

judgment, and the ease and expense of litigation in the forum. Such factors allow a court to "weigh relative advantages and obstacles to fair trial." *Id.* A trial court should also look to "public interest" factors such as the burden created for local court calendars and local juries by trials having no connection with the forum. The Court stressed that "[t]he doctrine leaves much to the discretion of the court . . . But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

In the exercise of discretion to retain jurisdiction of maritime tort suits, the United States Supreme Court early stated that "[t]he jurisdiction . . . will [be] exercise[d] . . . unless special circumstances exist to show that justice would be better subserved by declining it." *The Belgenland v. Jensen,* 114 U.S. 355, 367, 5 S.Ct. 860, 865, 29 L.Ed. 152 (1885). In this circuit, this standard for the exercise of this trial court discretion in resolving forum non conveniens contentions has been reiterated in these terms:

> [T]he question is not whether an injustice will result if the court does not exercise jurisdiction, but whether exercising jurisdiction will result in an injustice . . . Under the proper standard, the court must begin with the assumption it will exercise jurisdiction unless it is established, by the defendant, that an injustice would follow.

Poseidon Schiffahrt, G. M. B. H. v. The M/S Netuno, 474 F.2d 203, 205 (5th Cir. 1973), vacating a forum non conveniens dismissal. See also *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S,* 239 F.2d 463 (5th Cir. 1956), *cert. denied,* 353 U.S. 938, 77 S.Ct. 816,

1 L.Ed.2d 760. *See* Comment, The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts, 17 Va. J. Int. L. 755, 764 (1977).

[4] Reviewing the district court's exercise by this standard of its discretion to retain jurisdiction, we find no abuse. Even aside from the district court's correct determination that American law applies (which dictates rejection of a forum non conveniens dismissal, see part II of this opinion below), we would be unable to hold that the trial court discretion was abused when it retained jurisdiction, based upon such factors here present as: the accident having occurred in a United States port, with investigations having been undertaken by American agencies (the coast guard and the local fire department) and medical authorities; American counsel having been retained, with substantial steps toward adjudication having already been undertaken; the joinder with the maritime tort claims of a bona fide wage claim arising under American law; and the substantial issue from the onset of the litigation as to whether American or Greek law[6] applied to this accident. Thus, even if Greek maritime-injury law (see note 6) was ultimately decided to be applicable, we cannot say the trial court abused its discretion by retaining jurisdiction and denying a forum non conveniens dismissal.

[5, 6] We do not find persuasive the defendants' forum non conveniens arguments. First, they state that

6. Even if Greek law applied, a substantial showing is made by the plaintiffs' Greek-law expert that, in the event the death was caused by the defendants' gross negligence or failure to comply with a safety regulation, the plaintiffs' claim for maritime tort damages would be governed by the law of the place where the tort occurred, i.e., the United States.

the trial court's refusal to find *Lauritzen* factors alone determinative as to this issue presents an error of law or a clearly erroneous factual determination; but they overlook that these choice-of-law factors, while perhaps relevant since American law's application ends further inquiry (see II below), are not determinative as to forum non conveniens as *Lauritzen* itself states.[7] Second, the defendants argue that the *Belgenland* standard for retaining jurisdiction ("unless special circumstances exist to show that justice would be subserved by declining it,"

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7. *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). The decision essentially concerned a choice of law issue: Whether the American Jones Act could afford a claim for personal injury suffered in a Cuban harbor by a Danish seaman on a Danish flag vessel. The decision attempted to list the factors appropriate to influence the choice of whether American instead of foreign law was to govern a maritime tort claim. See Part III of opinion below.

The courts sometimes base the application or not of a forum non conveniens dismissal of a seaman's suit on *Lauritzen* factors. See, e.g., *Anastasiadis v. S. S. Little John*, 346 F.2d 281 (5th Cir. 1965). However, the *Lauritzen* court itself recognized that the forum non conveniens factor of the inaccessibility of a foreign forum "might be a persuasive argument for exercising discretionary jurisdiction to judge a controversy", but that the choice of law issue involved different considerations. 345 U.S. at 589-90, 73 S.Ct. at 932. The court in *Alegria v. Grand Bassa Tankers, Inc.*, 337 F.Supp. 401 (S.D. N.Y. 1971) correctly summarized the question thusly: "The doctrine of *forum non conveniens* should not be applied to the instant cases. Defendants, in relying upon *Lauritzen v. Larsen* . . . and its progeny, have misconceived the holding in that case which dealt with the 'factors which . . . are generally conceded to influence *choice of law* . . . We are not dealing here with choice of law but with a choice of forum, and *Gulf Oil Corporation v. Gilbert* . . . is the applicable authority rather than *Lauritzen v. Larsen*." *Id.* at 403. See also *The Fletero v. Arias*, 206 F.2d 267 (4th Cir. 1953), which recognized that the *Belgenland* forum non conveniens discretion applies to a seaman's suit for maritime injuries, although *Lauritzen* applies as to the distinctly separate choice of law (Jones Act) issue.

The chief relevance of the *Lauritzen* factors to a forum non conveniens decision is that if the choice is *American* law, it would rarely if ever, be appropriate to relegate the foreign seaman to a foreign forum, see II, *infra*, and no decision has been found so doing.

114 U.S. at 367, 5 S.Ct. at 865) applies only to collisions between foreign vessels and not to suits by a foreign seaman against a foreign vessel or owner[8]—a distinction for which no citation is offered, which has never been noted in the doctrinal literature,[9] and which has been ignored in decisions retaining jurisdiction over suits by foreign seamen against foreign ship parties.[10]

[7] An appellate court reverses the decision of a district court on a motion to dismiss on forum non con-

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8. The defendants rely upon the court's statement in *Belgenland* that "the case of foreign seamen is undoubtedly a special one when they sue for wages under a contract which is generally strict in its character and framed according to the laws of the country to which the ship belongs; framed, also, with a view to secure, in accordance with those laws, the rights and interests of the shipowners as well as those of master and crew, as well when the ship is aboard as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so. . . ." 114 U.S. at 364, 5 S.Ct. at 864. In context, the statement referred to situations where foreign law (then) clearly applied, as compared with the general maritime law found to be applicable in *Belgenland* (and thus a reason for retaining jurisdiction). When the law of a non-American forum clearly applies, this is of course a relevant factor for the application or not of forum non conveniens principles. The defendants' argument really addresses itself to the issue of whether the district court was correct in holding that the American law rather than Greek law applied.

9. Pickel, The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty, 35 Cornell L.Q. 12 (1949); Morrison, The Foreign Seaman and the Jones Act, 8 Miami L.Rev. 16, 17-18 (1953); Comment, A New Look at *Lauritzen v. Larsen*, Choice of Law and Forum Non Conveniens, 38 La.L.Rev. 957 (1978); Note, The Convenient Forum Abroad Revisited, 17 Va.J.Int.L. 755, 764-66 (1977).

10. See, e.g., *Conte v. Flota Mercante del Estado*, 277 F.2d 664 (2nd Cir. 1960) (Argentine law applied); *The Fletero v. Arias*, 206 F.2d 267 (4th Cir. 1956) (Argentine law applicable); *Heredia v. Davies*, 12 F.2d 500 (4th Cir. 1926).

veniens if it constitutes a clear abuse of discretion. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976); *Paper Operations Consultants International, Ltd. v. S. S. Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975); *The Kanto Maru*, 112 F.2d 564, 565 (9th Cir. 1940). Having found no such abuse, we affirm the district court's retention of jurisdiction.

II. *Choice of Law as a Factor in Forum Non Conveniens Decision*

The defendants have argued their forum non conveniens contentions on the basis of choice of law considerations, as if the latter supplied an interchangeable test for both issues. Some observations about the interplay of forum non conveniens and choice of law considerations might therefore be appropriate.

Lauritzen v. Larsen (discussed in III *infra*) is the fountainhead decision in determining choice of law principles to govern suits brought in American courts by foreign seamen against foreign shipping interests. *Lauritzen*, in reversing the lower courts' determination that the American Jones Act rather than a foreign compensation law governed, indicated that a forum non conveniens consideration was not relevant in the determination of the choice of law, even though it "might be a persuasive argument for exercising discretionary jurisdiction to judge a controversy." 345 U.S. at 589-90, 73 S.Ct. 932.

[8] To the contrary, however, choice of law factors are relevant in the determination of a forum non conveniens issue. This is so, because one of the factors favoring *non*-retention of jurisdiction is the application

of foreign law to the controversy, which is less convenient for American courts to apply than it is for the courts of that foreign country. *Gulf Oil Co. v. Gilbert,* 330 U.S. 501, 509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947); *DeMateos v. Texaco, Inc.,* 562 F.2d 895 (3rd Cir. 1977).

[9-11] Thus, where by application of the *Lauritzen* factors the correct choice of law decision is to apply *foreign* law (and a foreign forum is accessible), a district court's discretion in granting a forum non conveniens dismissal will not ordinarily be disturbed on review. *DeMateos v. Texaco Inc., supra; Anastasiadis v. S. S. Little John,* 346 F.2d 281, 284 (5th Cir. 1965); *but see Gkiafis v. Steamship Yiosonas,* 387 F.2d 460 (4th Cir. 1967). On the other hand, despite the choice of a foreign law as applicable, the district court's rejection of a forum non conveniens plea and its retention of jurisdiction will not be disturbed on review in the absence of a clear abuse of its discretion in the matter. See decisions cited at note 10 *supra.* Thus, once it is determined that foreign law clearly applies, it is then appropriate to apply forum non conveniens standards in determining whether to retain jurisdiction acquired over a maritime suit with foreign factors. *DeMateos v. Texaco, Inc., supra.*

[12] However, for similar forum non conveniens reasons, if United States law *is* applicable, the American court should retain jurisdiction rather than relegate the controversy to a foreign tribunal. Thus, for instance, in *Antypas v. Cia. Maritima San Basilio, S.A.,* 541 F.2d 307 (2nd Cir. 1976), the Second Circuit found that "[w]here the Jones Act applies, . . . a district court has no power to dismiss on grounds of *forum non con-*

veniens." Id. at 310. See *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 443 (2nd Cir.), *cert. denied*, 359 U.S. 1000, 79 S.Ct. 1138, 3 L.Ed.2d 1030 (1959); *Mattes v. National Hellenic American Line, S.A.*, 427 F. Supp. 619, 629 (S.D.N.Y. 1977). Because the consequences of a decision that American law applies are so conclusive on the issue, it has in fact been suggested that the initial inquiry in determining a forum non conveniens issue in a maritime case should be centered around the choice of law question.[11]

III. *Choice of Law: American or Greek?*

The choice of law issue is posed as follows: The plaintiffs contend that the American Jones Act and general maritime law as administered by United States courts furnish the substantive rules for determining liability and damages. The defendants contend that Greek law, furnishing a workmen's compensation type remedy, is in-

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11. Comment, A New Look at *Lauritzen v. Larsen*, Choice of Law and Forum Non Conveniens, 38 La.L.Rev. 957, 958 (1978):

> The mere fact that a suitor is a foreign seaman does not bring into play the doctrine of forum non conveniens. Foreign seamen's suits broadly fall into two categories: those which involve a cause of action based on the laws of the United States and those which do not. Forum non conveniens as applied to foreign seamen is properly concerned only with the latter class of cases, those in which a foreign seaman has no cause of action based on the laws of the United States. When a foreign seaman has a cause of action based on the laws of the United States the seaman comes by right into the courts and the retention of his suit based on domestic law should be mandatory. Retention of the suit is not discretionary, because once the scope of United States law has been defined the judiciary is not free to adjudicate selectively the effects of the law. Therefore, the object of judicial inquiry at the outset of a foreign seaman's suit is to determine the applicable law, and only if United States law is found not to govern the suit should the appropriateness of the United States forum be examined.

stead applicable. The plaintiffs alternatively contend that, if Greek law *does* furnish the rule of decision, then under the present circumstances of the defendants' gross negligence, the law of Greece would allow an action, upon the maritime tort, in which the determination of the substantive issues is decided in accordance with the law of the place of the tort (i.e., the United States, and its Jones Act and the maritime law as administered by its courts).

When a foreign seaman brings suit against a foreign vessel or foreign shipping defendants, the factors to be examined in determining a choice of whether United States or some foreign law applies, have been set out by the United States Supreme Court in the *Lauritzen-Romero-Rhoditis* trilogy: *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970); *Romero v. International Terminal Operating Company,* 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); *Lauritzen v. Larsen,* 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953).

Lauritzen set out seven connecting factors generally regarded as significant, to be listed below, and in the case before it held that the overwhelming preponderance of these factors favored application of the foreign law, thus rejecting the application of the American Jones Act sought by the plaintiffs. *Romero* held that the *Lauritzen* factors applied to the determination of whether "the maritime law of the United States" may be applied, 358 U.S. at 381, 79 S.Ct. at 485, as well as to whether the Jones Act might be applied. *Rhoditis*, the latest of these decisions, expanded on the *Lauritzen* test by stating that its list of seven factors "was not intended as exhaustive" and

that the test was "not a mechanical one." 398 U.S. at 308-09, 90 S.Ct. at 1734. In holding the Jones Act to be applicable, the court noted that to effectuate the liberal purposes of the Jones Act the "real nature of the operation" and "the actual operational contacts that this ship and this owner have with the United States" must be considered 398 U.S. at 310, 90 S.Ct. at 1734-35. The *Rhoditis* gloss on the *Lauritzen* tests indicate that the appropriate application of United States law to the foreign seaman's suit depended on the substantiality of the contacts with the United States of the foreign defendant involved in the transaction. *Lauritzen* noted seven factors as significant for consideration: (1) Place of wrongful act; (2) Law of the flag; (3) Allegiance or domicile of the injured; (4) Allegiance of defendant shipowner; (5) Place of the contract; (6) Inaccessibility of foreign forum; and (7) Law of the forum. *Rhoditis* noted an eighth factor of importance,[12] the shipowner's "place of operations" indicating that otherwise an alien owner with substantial business operations in this country might, by escaping his obligations as a Jones Act "employer", be unfairly advantaged over citizens of this country engaged in the same business. 398 U.S. at 309, 90 S.Ct. 1734.

[13] The defendants make an extremely strong case for application of Greek law. They point out that the ship flew a Greek flag and had Greek registry, that the deceased seaman was of Greek nationality and had signed

12. In *Rhoditis* a suit under the Jones Act was brought, as here, by a Greek seaman injured in a United States port aboard a Greek flag vessel owned by a Greek corporation. Under the *Lauritzen* test, four factors favored the defendant shipowner and against the retention of jurisdiction. Yet, since it was determined that the defendant had a substantial base of operations in the United States, the court decided that United States law should apply, despite the fact that the factors delineated in *Lauritzen* would suggest otherwise.

his employment contract in Greece,[13] and that the law of the American forum should not be applied simply because the accident occurred in an American port. They also point out that the defendants, although a Liberian corporation (the owner) and a Panamanian corporation (the operator), were owned entirely by three Greek shareholders.[14] They rely additionally upon the circumstance that the decedent's survivors had a remedy (in the nature of workmen's compensation, as in *Lauritzen*) available to them in the Greek courts.[15]

[14] The district court held, however, that it was instead appropriate to apply United States law to the consequences of this accident in an American port, to which a seaman had flown to join the vessel, and in which he had worked during his entire service on the vessel prior

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13. The contract also included a provision that Greek law and Greek courts would exclusively determine rights under the employment contract including claims on account of illness or accident. A similar agreement was disregarded as of little relevance in *Rhoditis*, in its determination that the American Jones Act afforded a remedy to a Greek seaman under circumstances similar to the present. Probably due to the disparity in bargaining power between the seaman and his employer, American courts have generally accorded little determinative weight to such contractual choice of law provisions. G. Gilmore and C. Black, The Law of Admiralty 476 (2d ed. 1975).

14. The plaintiffs argue that the Liberian and Panamanian incorporations by the Greek nationals, presumably adopted to avoid application of some Greek laws, should not be selectively disregarded at the option of the defendant corporation, solely urged to require the application of Greek law and to defeat the application of American law to the plaintiffs' claim.

15. In arguing that a Greek forum is not accessible, the plaintiffs rely upon expert evidence to the effect that, under Greek law, the domicile of the corporations (not of the stockholders) (see note 14 *supra*) determines personal jurisdiction, and that an agreement between parties to confer jurisdiction on Greek courts (see note 13 *supra*) is not enforceable in Greece.

to the fatal accident there. In rejecting the defendants' substantial contention that Greek law should be applicable, the district court primarily relied upon as a determinative factor that, prior to the accident,[16] the vessel's entire service under its present ownership, and its entire revenues therefore to be earned, arose from a base of operations in the United States. Under the *Rhoditis* gloss on *Lauritzen* factors, this substantial use of a United States base of operations for the shipping and revenues of the vessel and its owner, together with the other United States contacts (the latter of which may not by themselves have been sufficient for the purpose), justified the choice of the Jones Act and of general maritime law as administered by American courts as a more appropriate basis for decision than the Greek compensation law. *Rhoditis, supra,* 398 U.S. 308, 90 S.Ct. at 1733 (entire income derived from cargo going to or coming from the United States); *Antypas v. Cia. Maritima San Basilio, S.A.*, 541 F.2d 307, 309-310 (2nd Cir. 1976) (most voyages to or from United States ports); *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 473 (2nd Cir.), *cert. denied,* 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1974) (40% of its voyages were either to or from American ports); *Mattes v. National Hellenic Am. Line, S.A.*, 427 F. Supp. at 619, 624 (S.D.N.Y. 1977) (most

16. From external manifestations as of the time of the accident, the vessel had been purchased primarily to service the American grain trade. The defendants argue that the vessel's post accident use belied extensive service to and from American courts. However, we agree with the plaintiffs that the post-accident use of a foreign vessel previously used entirely in America should not be determinative as to the application or not of American law. But for the accident(s) in an American harbor causing large exposure to damages under American law, the plaintiffs ask, who is to say that the owner and operator might have continued to have the vessel ply to and from American ports in the profitable carriage of American grain cargos?

voyages either originated or terminated in United States ports).[17]

We thus do not find merit to the defendants' argument that the district court erred in its conclusion of *law* that United States law may apply to this foreign seaman's accident in a United States port, where the vessel had a substantial base of operations in the United States and its owners derived substantial revenues from United States trade. Under *Rhoditis* and subsequent jurisprudence, there was a sufficient nexus between the defendants and this country so as to justify the application of United States law.

[15] The defendants' contention, then, is rather that the district court was clearly erroneous in its factual finding that the vessel had a substantial United States base of operations and thereby derived substantial revenues. See its conclusions of law III and XII (making III a conclusion of fact also). The district court's determination that a shipowner has or has not a substantial base of operations in the United States is a factual finding that should not be disturbed on review unless clearly erroneous. *Fitzgerald v. Liberian S/T Chryssi P. Goulandris,* 582 F.2d 312, 315 (4th Cir. 1978). "A finding is 'clearly erroneous' when although there is evidence to support it,

17. Here, under the findings, substantial revenues were derived from a substantial base of operations in the United States. We do not, of course, intimate that doing *any* amount of business in a U.S. port, however minor, is alone sufficient to establish a "substantial base of operations." See *Romero, supra; Manlugon v. A/S Facto,* 419 F.Supp. 550 (S.D. N.Y. 1976); *Rodriguez v. Orion Schiffahrts-Gesellschaft Reith & Co.,* 348 F.Supp. 777 (S.D. N.Y. 1972). Furthermore, the place of the wrongful act alone being in the United States is an insufficient factor upon which to base retention of jurisdiction. See *Yohanes v. Ayers Steamship Co.,* 451 F.2d 349 (5th Cir. 1971); *Koupetoris v. Konkar Intrepid Corp.,* 402 F.Supp. 951 (S.D. N.Y. 1975).

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *Dresser Industries v. Fidelity & Cas. Co. of N. Y.*, 580 F.2d 806, 807 (5th Cir. 1978).

[16] So tested, we cannot find reversible error. The AGIOS NICOLAOS V had proceeded directly to a United States harbor from Spain upon its purchase by the defendant Valsky, the only vessel owned by that corporation.[18] After its purchase, the vessel proceeded without a cargo directly to a United States port for the purpose of carrying a cargo of American grain to Russia, and the trial court might reasonably have found that it had been purchased for the purpose of such trade. Its entire business activity prior to the accident had been in the United States. The decisions relied upon by the appellant are factually distinguishable as involving less substantial United States operations and contacts in the operation of the vessel.

Since we have found no error in the district court's conclusion United States law applies, we need not reach the plaintiffs' alternative contention: Even if American law were not applicable under the *Lauritzen-Rhoditis* tests, the Greek law—if applicable to the present accident —would still require a determination by reference to American law. In making this contention, the plaintiffs

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18. The plaintiffs additionally rely in brief upon the purchase of the vessel having been financed through a United States bank branch. See *Gomez v. Karavias*, 401 F.Supp. 104, 107 (S.D. N.Y. 1975). The defendants do not in brief contest this finding, but the full deposition to which record citation is made is not in the appellate record. The excerpts from this deposition furnished for the record by the defendants are ambiguous as to this contention.

rely upon the testimony of an expert witness relative to Greek law. He testified that, in circumstances of either gross negligence or of a breach of safety regulations causing injury (as plaintiffs state is here present, see factual summary in footnotes 2 and 3 *supra*), a Greek seaman injured in a foreign port on a Greek vessel has a tort action under Greek law that is governed by the place of the tort (i.e., here, the American harbor).

IV. *Computation of Damages*

[17] Finally, the defendants contend that, at any rate, the district court erred (a) in its failure to discount future earnings to present value and (b) with regard to prejudgment interest allowed on the entire record. However, we ultimately hold that any errors in calculation are harmless (if erroneous), because in clear error the district court likewise computed earnings at 750 *dollars* instead of at 750 *British pounds* (worth $1,350) per month. Any erroneous allowance was thus cancelled out (see IV(c) *infra*) by the diminution in the awarded damages resulting from this erroneous calculation based on dollars instead of pounds. *International Paper Company v. Busby*, 182 F.2d 790, 793 (5th Cir. 1950).

(a) *Failure to discount future earnings*

The district court awarded $108,800 to the decedent's widow and child. Of this amount, $13,750 is for loss of contributions prior to judgment, and $95,050 for *future* loss of contributions.[19]

19. The decedent's *annual salary* was found by the district court to be $9,000. Of this amount, $3,000 was the amount found that decedent would spend for his own needs, $500 for his parents, and the remaining amount ($5,500) for his widow and child. The award was based on decedent's life expectancy of 19.8 years.

In refusing to discount to present value the decedent's loss of future earnings, *Johnson v. Penrod Drilling Company*, 510 F.2d 234, 237 (5th Cir. 1975) (en banc), the district court specifically found that "the future earnings discounted would not more than equal the increase in earnings that the deceased in all probability would have received in the future had he lived and worked his full remaining worklife."

The defendant contends that discount for such reason is not permissible unless the record contains evidence that such future increase in earnings would most probably have been granted in recognition of performance and experience, rather than upon *Johnson*—prohibited inflationary factors alone. *Higginbotham v. Mobil Oil Corporation*, 545 F.2d 422, 434-35 (5th Cir. 1977). In countering this contention, the plaintiffs rely upon deposition testimony considering the decedent's superiority as a worker, his steady advancement over the years, his attending school in 1975 to receive specialized training for purposes of even further advancement in his profession as chief engineer, and the increase in his salary as a chief engineer of over 25% in the last five years of his life. The defendants contend, however, that it is not ascertainable from this evidence the extent to which cost-of-living increases, rather than the individual's own performance and experience had contributed, to the more recent increases in the salaries paid him. Because of an error in calculation undercompensating the plaintiffs, we find the error (if any) harmless. See IV(c) *infra*. We therefore need not resolve this issue.

(b) *Prejudgment interest*

[18] (1) the defendants correctly point out an error in the calculation of the district court's award. Prejudgment interest was allowed on a loss of future earnings awarded (as to which, of course, no loss by delay in paying had been caused at the time of judgment). *Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 339 n.2 (5th Cir. 1972); *Petition of the City of New York*, 332 F.2d 1006 (2nd Cir. 1964); *Hamilton v. Canal Barge Company, Inc.*, 395 F.Supp. 978, 992 (E.D. La. 1975). Nevertheless, in view of an error in calculation to the prejudice of the plaintiff, this error is harmless. See IV(c) below.

[19] (2) The defendants also argue that the appropriate annual rate of prejudgment interest in Texas is 6% instead of the 9% awarded. Pretermitting the issue of the district court's admiralty discretion to allow under some circumstances a greater rate than the statutory rate prevalent in the state, *In re Vulcan*, 553 F.2d 489 (5th Cir. 1977), another panel of this court has recently, after examination of the conflicting Texas authorities, concluded that the trial court did not abuse its dicretion in awarding 9% prejudgment interest as appropriate under *state* law in a non-admiralty claim. *Dallas-Fort Worth Regional Airport Board v. Combustion Equipment Associates, Inc.*, 623 F.2d 1032, 1040-1042 (5th Cir. 1980) (syllabus 14). We find no abuse of discretion here.

(c) *Harmless error*

In its finding of fact, the district court stated that the decedent was paid "a monthly wage of $750 and a yearly wage of $9,000," and calculated the decedent's loss of earnings on this basis. However, the use of the *dollar*

figure for monthly wages was clearly erroneous, since the uncontradicted testimony shows that the decedent was paid in *British pounds* at a rate of 750 pounds per month, see Exhibit P-2 and Transcript of evidence II, pp. 54, 105, cf. Astifidis dep. p. 48, and that at the applicable time the exchange rate was 1.8176 dollars to the pound, Tr. II, p. 57 or approximately $1,350 per month or $16,200 annually.[20]

If the computation of earnings loss had been correctly calculated on the basis of British pounds instead of dollars, the amounts actually awarded by the district court would have closely approximated the amounts that the plaintiffs were entitled to be awarded on the basis of the district court's findings. See Appendix attached to this opinion, which sets forth the detailed computations. The district court's errors in calculation therefore cancelled out any prejudice claimed by the defendants, since the plaintiffs were undercompensated to the same extent, and the errors, if any, are harmless. See *International Paper Company v. Busby*, 182 F.2d 790, 793 (5th Cir. 1950).

Conclusion

For the reasons set forth above, we AFFIRM the district court judgment.

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20. In calculating earnings on a twelve month basis, the district court rejected the defendants' argument that a lesser work year of 7.6 months per year should be allowed. The argument was based upon the decedent's average work-year during the five years prior to his death. The evidence shows, however, that the decedent had gone to school to become a diesel chief engineer for a part of those five years, Astifidis dep. pp. 24, 25, 39; that in that interval he had worked continuously for 14 months and 14 days, *Id.* at pp. 20, 21; and that Greek seamen receive annual bonuses totalling approximately 2½ months salary. Tr., II, pp. 106-108.

APPENDIX

The trial court computed the *loss of contributions* based on decedent's salary of $750 per month. However, the testimony clearly established that the decedent's monthly income was 750 British pounds. (Expert testimony established that the applicable exchange rate was 1.8176 dollars to the British Pound Sterling.)

In using the $750 a month figure, the trial court calculated decedent's yearly income at $9,000. Finding that decedent would spend approximately one-third on himself, the court found the remaining $6,000 would be spent by decedent for the benefit of his wife and child, in the yearly amount of $5,500, and his parents, in the yearly amount of $500. (The amount to his parents—total of $5,000 to each—appears to have already been discounted to present value.)

Based on the widow and child receiving $5,500 yearly, the court multiplied this figure by the life expectancy of the deceased. The total loss of contribution to the widow and child was found to be approximately $108,800. The trial court then granted prejudgment interest on the entire amount at 9% for 2.5 years (time between death and judgment) and failed to discount it. Therefore, the ultimate award (including prejudgment interest) for *loss of contributions* totaled $133,280. The trial court failed to discount any portion of this award.

As stated in the body of the opinion, the trial court erred in granting prejudgment interest on future earnings awarded, as well as possibly by failing to discount to present value that portion attributable to future loss of support. Nevertheless, when the damages are properly recalculated by computing the decedent's monthly salary

at 750 British pounds, the trial court's computation, if erroneous in these regards, was harmless.

At 750 pounds per month, decedent's monthly salary was approximately $1,350. Decedent's yearly salary, therefore, would be $16,200. Of this amount, decedent would under the district court's findings use one-third ($5,400) yearly for himself, $500 per year for his parents, and the remaining $10,300 for his widow and child.

Accepting the defendants' allocation as appropriate for discount computation, the decedent's life expectancy will be attributed as follows: 2.8 years from death to date of judgment and 17.0 years post-judgment.

The loss of contribution to his widow and child prior to date of judgment, then, is $28,840 (2.8 × $10,300). Prejudgment interest at 9% should be allowed on this amount. The interest on this is rounded to $2,596. Hence, prejudgment loss of contributions should have been calculated by the trial court to be $31,436, including interest.

Accepting the defendants' contention that discount was appropriate, post-judgment loss of contribution should have been calculated as follows: $10,300 per year × 17 years, discounted to present value at 7½% (the then prevailing rate in the community for federally issued certificates of deposit). The post-judgment loss of contribution would be $97,170. See Gushee, Financial Compound Interest & Annuity Tables, 1942. Thus, the total loss of contributions to widow and child, utilizing a 7½% discount value, was $128,606.

However, the trial court stated that, if it *did* discount to present value (as it ultimately did *not*), it would use

a 6% interest rate. Tr. III, p. 445. If such a discount rate were used, the total (discounted) loss of contributions to the decedent and the widow would be as follows: prejudgment, $31,436; post-judgment, $107,913; total, $138,349. See Gushee, *supra.*

In conclusion the trial court actually awarded the widow and child, for loss of contributions, the amount of $133,280 (including prejudgment interest), based upon its erroneous use of a monthly salary for the seaman of 750 dollars instead of 750 British pounds (i. e., $1,350 monthly). If the amount were recomputed correctly by using the decedent's accurate monthly income (750 British pounds, i. e., $1,350), the trial court award would be between $128,606 (discounted at the 7½% contended for by the defendants) and $139,349 (discounted at 6%, the rate held to be proper by the trial court, if any discount were allowable).

Accordingly, the error of the district court in the computation of damages was harmless error.

AFFIRMED.

APPENDIX 2

Jack FISHER, etc., Plaintiff-Appellee,

v.

The AGIOS NICOLAOS V, et al.,
Defendants-Appellants.

Eugenia KEPESSIDIS, Individually, etc., et al.,
Plaintiffs-Appellees,

The AGIOS NICOLAOS V, etc., et al.,
Defendants-Appellants.

No. 79-1103.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

Jan. 28, 1981.

Appeal from the United States District Court for the Eastern District of Texas; Joe J. Fisher, Judge.

Robert S. DeLange, Galveston, Tex., E. D. Vickery, Houston, Tex., for defendants-appellants.

Paul H. Due, Baton Rouge, La., for Eugenia Kepessidis.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion October 10, 1980, 5 Cir., 1980, 628 F.2d 308).

Before MORGAN, CHARLES CLARK and TATE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.

JOHN R. BROWN, Circuit Judge, with whom AINSWORTH, GEE, TJOFLAT, VANCE, GARZA, AND RANDALL, Circuit Judges, join dissenting:

I must dissent from the Court's refusal to rehear this case en banc. Left to stand, the opinion-decision opens the 19 District Courts of the six maritime states of this Circuit and, by precedent, all of the federal and state courts of the nation to injury/death claims by foreign crew members against their foreign flag employers for recovery under American statutory (Jones Act) or general maritime law. All that is required to trigger this new burden on beleaguered federal courts is the presence of the foreign flag vessel to pick up cargo on the ship's sole voyage to an American port. There need be no American direction, control or operation, nor the presence of foreign nationals as domiciliaries running things from an American base.

In more austere terms I believe that the panel's opinion is contrary to law of this Circuit and of the Supreme Court. I am particularly concerned with that portion of the panel's opinion concerning the choice of American law. The choice of law question is a significant one in and of itself, and, perhaps even more so, because as the panel concedes "law factors are relevant in the determination of a forum non conveniens issue."[1] *Fisher v. Agios Nicoloas V*, 628 F.2d 308, 315 (5th Cir. 1980).

The significant facts of this case, for choice of law purposes, are not in dispute. The decedent was a citizen of Greece. *Id.* at 316. The vessel flies a Greek flag and is registered in Greece. *Id.* The two corporate defendants which own (Liberian) and operate (Panamanian) the vessel are themselves owned and operated by three brothers, all of whom are resident citizens of Greece. *Id.* at 311, n.1. The decedent signed his employment contract in Greece. *Id.* at 316. The only thing American is the fortuitous circumstance that the fatal injuries took place in Beaumont, Texas.

The only two factors which under *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) might suggest the application of American law are the fact that the accident occurred in American waters and that the forum chosen is American.[2] However, neither of these factors have been accorded particular weight in choice of law determinations.[3] The additional factor

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1. Without extended discussion I disagree also with the panel decision on forum non conveniens.

2. The panel did not pass on plaintiffs' argument as to the inaccessibility of Greece as a forum. 628 F.2d at 317, n.14, 15.

3. For insignificance of place of injury as a *Lauritzen* factor, see *Lauritzen*, 345 U.S. at 583, 73 S.Ct. at 928; *Koupetoris v. Konkar*

cited by the panel that the decedent joined the vessel in the United States has similarly been accorded little weight.[4]

There is no doubt that under a strict *Lauritzen* analysis, foreign law would apply. However, relying on *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970), the panel supports the finding of the District Court that defendants had a substantial base of operations in the United States and, accordingly, that American law should apply. The panel's reliance on *Rhoditis* is misplaced, first, because I believe that some of the findings of the panel with respect to defendants' purported "base of operations" in the United States simply have no support in the record, and second, and much more significant for purposes of en banc consideration, because I am convinced that the panel's opinion misinterprets the holding of *Rhoditis* and applies a legal standard contrary to the law of this Circuit.

As found by the panel, the vessel here had sailed on its maiden voyage under the ownership and operation of defendants to Beaumont, Texas to load a cargo of corn for delivery to the Soviet Union. 628 F.2d at 311. Although this was the first, and only, business venture of the vessel, under ownership of defendants, at a United States port prior to the time of the accident, the panel supports the District Court's conclusory finding that de-

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Intrepid Corp., 535 F.2d 1392, 1396 (2d Cir. 1976); *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472-73 (2d Cir. 1974). For insignificance of law of forum as a *Lauritzen* factor, see *Lauritzen*, 345 U.S. at 591-92, 73 S.Ct. at 932-933; *Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024, 1026 (2d Cir. 1973).

4. Although the Plaintiff in *Lauritzen* joined the crew of the vessel in New York, the Court found this factor to be of little significance. 345 U.S. at 587, 73 S.Ct. at 930.

fendants had a substantial base of operations in the United States observing that

> The District Court primarily relied upon as a determinative factor that, prior to the accident, the vessel's entire service under its present ownership, and its entire revenues therefore to be earned, arose from a base of operations in the United States.

Id. at 317. While this may be true as a naked proposition, the same could be said for any vessel coming into a United States port on its maiden voyage for purposes of taking on cargo. And if that reasoning is valid here it would mean that every injury/death to a foreign seaman occurring in a United States port on the vessel's first voyage to this Country would invoke American law —Jones Act or General Maritime.

The panel goes on to state in a footnote that "[f]rom external manifestations as of the time of the accident, the vessel had been purchased primarily to service the American grain trade." *Id.*, n.16. The District Court made no such finding and I have been unable to uncover any evidence in the record to support such a finding. This is a remarkable "finding' considering the minimum life expectancy of twenty years for a modern ship and that the mission for the vessel is to be determined by the nature of the first voyage and cargo. The only other factor relied upon by the panel to support its substantial base of operations finding[5] is the fact that the vessel

5. The panel also points out in note 18, 628 F.2d at 318, that plaintiffs rely in brief upon the purchase of the vessel having been financed through a United States bank branch. However, the panel does not appear to rely upon this contention, finding that the record is ambiguous on this point. At any rate, the mere financing by American sources of a foreign vessel has been held of little significance in a *Rhoditis* analysis. *Zoriano Sanchez v. Caribbean Carriers Ltd.*, 552 F.2d 70, 73 (2d Cir. 1977).

in question was the only vessel owned by the defendant shipowner.

It is significant that neither the District Court nor the panel made any finding to the effect that defendant corporations or any individuals having anything to do with their direction and control had their principal—or indeed, any—place of business in the United States. Nor was there any finding that the expenses of the vessel were paid in the United States, or that the actual management of the vessel was from a United States office, or that any of the stockholders of the defendants were United States citizens or residents. Indeed, no finding was even made that defendants maintained any offices in the United States or were even affiliated with any organization that had offices or operations in the United States.

Although I am disturbed by what I feel to be an unfounded conclusion of the panel that this vessel, at the time of the accident, had engaged in and/or contemplated substantial operations in United States ports, I am even more concerned by the legal implications of the panel's opinion. In spite of the panel's disclaimer that it "do[es] not, of course, intimate that doing *any* amount of business in a United States port, however minor, is alone sufficient to establish a 'substantial base of operations' " (*Id.* at 317, n.17), the clear purport of the panel's opinion is that a foreign defendant whose vessels regularly call at United States ports subjects itself to American law for the resolution of personal injury or death claims of the vessels' crew members occurring within American waters.

In fact, each of the cases cited by the panel in support of its holding emphasizes parenthetically the frequency of visitation to United States ports, or the substantial

revenue earned from United States trade, as the distinguishing feature of the case. An examination of the cases cited by the panel, however, belies the notion that merely conducting business in United States ports is sufficient to establish a "substantial base of operations" for purposes of applying American law. None of the cases, which I review briefly here, involves contacts as insubstantial as those in this case.

While it is true, as emphasized by the panel, that in *Rhoditis* the Court found that the entire income of the vessel was from cargo either going to or coming from the United States, the Court also emphasized that the corporate defendant had its largest office in New York and another office in New Orleans, and that more than 95% of its stock was owned by an individual who, though a Greek citizen, was a United States domiciliary who managed the corporation out of New York. 398 U.S. at 307, 90 S.Ct. at 1733.

Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d 307 (2d Cir. 1976) did involve, as the panel states a vessel most of whose voyages were to or from United States ports. However, the Court in determining American law to be appropriate in that case, also relied on the fact that at least some of the stockholders of the shipowner were American citizens, that the vessel was under the direct control of an American corporation which directed the vessel from its office in New York, and that the earnings and expenses of the vessel appeared to be collected and paid from New York. *Id.* at 310.

In *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470 (2d Cir.); *cert. denied*, 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1974) the Court did find that 40%

of the vessel's voyages were either to or from American ports. However, the Court also found that "of the contacts favoring the Plaintiff in the present case, the most important is that all of the stock of all of the defendants was owned by Americans." *Id.* at 473. The Court also found that all of the defendants had their base of operations in the United States and that the managing and chartering of the vessel was done from the United States. *Id.*

Finally, in *Mattes v. National Hellenic Am. Line, S.A.*, 427 F.Supp. 619 (S.D. N.Y. 1977, while true that the District Court found that most voyages of the vessel either originated or terminated in United States ports, the Court further found that at least two American corporations played a significant role in the management of the vessel's affairs. *Mattes* can be further distinguished from our case since the ship was a passenger vessel the vast majority of whose passengers were American citizens, and thus, the Court believed, there was an additional compelling national interest in applying American law. *Id.* at 628.

After making my own survey of Circuit Court cases concerning choice of law under the Jones Act and general maritime law I have found no case which has held that the mere fact that a vessel calls regularly at a United States port is sufficient to satisfy the "substantial base of operations test" of *Rhoditis*. In our own Circuit, it is clear that something more than frequent calls is required, as evidenced by three cases which the panel opinion failed even to cite but necessarily failed to follow.

In *Merren v. A/S Borgestad*, 519 F.2d 82, 83 (5th Cir. 1975), this Court, while not mentioning the frequency of visitation of the vessel to the United States,

rejected the application of the base of operations test finding that

> defendants maintained no offices in the United States and were affiliated with no organization in the United States, except to the extent of having shipping agents who contracted in American ports for the use of the ship's services.

Id. at 83.

Similarly, in *Tamboris v. Kainis Compania Maritima, S.A.*, 439 F.2d 1131, 1132 (5th Cir. 1971), while not discussing the frequency of visitation of the vessel to the United States, this Court rejected application of *Rhoditis* finding that unlike that case "it is here undisputed that no American citizens or residents own any share of the owning corporation, directly or indirectly."

More recent and more to point is an unpublished opinion of this Court affirming the District Court's rejecting the application of American law on facts strikingly similar to those in this case. *Avila v. M/V TOLUCA* (No. 79-2921, May 30, 1980). The memorandum and recommendation of the Magistrate, Norman Black, now United States District Judge, which was adopted in full by the District Court and which formed the basis for affirmance by this Court, specifically rejected Plaintiff's argument that the frequency of the vessel's visit to the United States established a substantial base of operations for purposes of *Rhoditis*. The memorandum opinion set out in full as *Appendix*, found that:

> From a reading of the relevant cases . . . doing business in, or trading at, a United States port is not the

same thing as establishing a base of operations in the United States as set forth in *Rhoditis*.[6]

Although nowhere expressed, the panel, oblivious to the existence of these three Fifth Circuit opinions, seems to operate on the dubious theory that this Court merely approved as not clearly erroneous the finding by the trial court that a substantial base of operations was established. Where legal standards are involved—as they must certainly be under *Lauritzen* and *Rhoditis*—they may not be ignored, overlooked or watered down by any such distortion of the function of F.R.Civ.P. 52(a).

The substantially identical facts in *Merren, Tamboris* and most particularly *Avila,* on the one hand and those in the instant case cannot justify the rejection of American law in those three while allowing it here. To conclude otherwise is to permit decision of this very significant question of law to be determined, not by principles, but by an unguided fact finding.

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6. This Court continues to face claims by foreign seamen based on tenuous grounds for the application of American law and, after the decision in this case, will undoubtedly face many more. For example, very recently in the case of *Nunez-Lozano v. Rederi,* 634 F.2d 135 (5th Cir. 1980) this Court was faced with the question of whether American law was appropriate in a case where a Honduran seaman was injured in Liberia while aboard a Norwegian vessel. Although he received Norwegian compensation, the seaman sought to invoke American law on the grounds that he joined the vessel and signed his seaman's contract in New Orleans and that he returned to New Orleans for treatment after the accident. Faced with insufficient contacts under *Lauritzen,* the seaman urged application of *Rhoditis* on grounds that "the existence of stockholders in 'companion corporations' proved that appellee's corporate citizenship is not 'exclusively Norwegian'." Although the Court declined application of American law on these facts, one can only wonder if the Honduran seaman would have presented a different set of facts, and possibly prevailed, if the instant case had been decided at the time he first pressed his claim in District Court.

One need only look in the Yellow Pages to see the number of foreign shipping lines which regularly trade to and from United States ports in established liner service. I seriously doubt that when the Supreme Court handad down *Rhoditis,* it contemplated that, for example, a French cargo vessel, owned and operated by the French government, flying the French flag, carrying a French crew, and directed out of France, would be subject to the laws of the United States for the resolution of the personal injury claims of its crew members occurring in American ports, even if the vessel regularly called at United States ports and derived considerable revenue from this trade.

And yet this is the direct implication of the panel's opinion. While such a rule of law might seem to some to be desirable—I personally feel it is not—I believe that before the federal courts of this Country are opened significantly wider to the claims of every foreign seamen and their heirs for injury/death occurring in American waters, specific directions should come from Congress or at least from this Court sitting en banc or from decisive change in the applicable legal standard by the Supreme Court.

As a major maritime world power encouraging commerce to and from America by opening all ports to all vessels of all nations flying all flags, what does this decision portend? Does it mean that Congress or federal courts intended to open all American courts to the hundreds of thousands of seamen to receive and dispose of their claims for injury/death fortuitously occurring within our borders as their ships come here from time

to time?[7] Is our renowned largesse for humanity to lead us not only to substitute our legislative or judicial concepts for those of their own countries, but to supplant the system and standards thought to be sufficient by their own countries?

The opinion offers no answer to these and other troubling questions save the simplistic one: Leave it to the fact finder—Judge or jury—

I must therefore dissent.

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7. Even more disturbing is the unanswered question of whether federal courts are to be opened to claims of foreign seamen injured or killed in disparate spots throughout the globe on vessels which merely call at United States ports. As noted previously (see n.3, *supra*), place of injury is a factor of little weight in a strict *Lauritzen* analysis and clearly has no weight in a *Rhoditis* "base of operations" analysis. If the meager contacts of this case support the application of American law it is a very small step to apply American law in cases distinguishable from this case only by the legally insignificant, for maritime choice of law purposes, fact that the injury/death occurred outside of American waters.

Appendix

The unpublished opinion of this Court in *Avila v. M/V Toluca* (No. 79-2921, May 30, 1980) reads as follows:

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

PER CURIAM:

Affirmed on the basis of the district court's order and judgment dated July 10, 1979 adopting the Memorandum and Recommendation of the United States magistrate dated April 6, 1979.

AFFIRMED.

The following is the memorandum and recommendation of the United States Magistrate, also unpublished:

This action was filed by the father of Rafael Aguilar Avila, a Mexican seaman who lost his life while serving aboard Defendant's ship in the Port of Covington, Maryland, on May 5, 1975. Suit was brought under the Jones Act, 46 U.S.C. § 688, and the General Maritime Law of the United States. Defendant has filed a motion to dismiss for lack of subject matter jurisdiction, and alternatively for the doctrine of forum non convenience. Plaintiff requests that the Court deny the motion and grant a six-month period of additional discovery on the questions of jurisdiction and forum non convenience, or, in the alternative, to transfer the action to the United States District Court in Maryland.

Defendant alleges the following:

The contacts of Defendant with the United States are not substantial and are insufficient to invoke the Jones Act or the General Maritime Laws of the United States. The only contact that the United States has with this lawsuit is the drowning of Rafael Aguilar Avila in the Port of Covington, Maryland. Everything else is completely Mexican, including the following:

1. Plaintiff's descendant, Rafael Aguilar Avila, signed in Mexico an employment agreement governed by the law of Mexico for employment aboard the M/V TOLUCA II as a seaman.

2. Rafael Aguilar Avila was a Mexican citizen and resident at the time of employment and at the time of his death.

3. The Plaintiff herein, the father of Rafael Aguilar Avila, is a Mexican citizen and resident.

4. The vessel, M/V TOLUCA II, is of Mexican registration and wholly owned by Mexican citizens.

5. The Defendant herein, the employer of Plaintiff, Transportation Maritima Mexicana, S.A., is a Mexican corporation wholly owned by Mexican citizens. There is no United States beneficial ownership of any kind in Transportation Maritima Mexicana or the M/V TOLUCA II. This is not a "flag of convenience" case.

6. All of the members of the crew of the vessel who could possibly be witnesses of any kind in this cause of action, are Mexican residents and Mexican citizens.

7. The deceased seaman, Rafael Aguilar Avila, and his employer are subject to Mexican law, and pursuant

to such law, the mother of Rafael Aguilar Avila and his designated beneficiary, Maria Antonio Avila Alonso, executed a release on June 9, 1975, releasing Defendant, the TOLUCA II, and the captain and members of the crew of the vessel, in accordance with the laws of Mexico from any and all responsibility for his death in consideration of the sum of 80,000 pesos.

8. The headquarters and home offices of the Defendant are all located in Mexico. The affairs of the Defendant company were conducted from Mexico. The M/V TOLUCA II is operated by Defendant from Mexican offices and had no base of operations in the United States. There are no operating agents employed in the United States. The only agents employed by Defendant are temporary, husbanding agents who represent the vessel in a limited capacity only while the vessel is in a foreign port.

9. The M/V TOLUCA II is an ocean going cargo vessel and operates out of the ports of Mexico to various foreign ports of the world, some of which are in the United States.

Plaintiff generally responds as follows:

1. Thirty percent of Defendant's shipping business is done in and out of the ports of the United States.

2. Most of the voyages of the M/V TOLUCA II in the years 1974 and 1975 (the accident occurred in May, 1975), at least up until it was assigned to a permanent arrangement outside the United States' ports in August of 1975, were to and from the United States. Ninety-seven visits to American ports for the period 1973 through August 15, 1975, were counted.

SUBJECT MATTER JURISDICTION

In *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 440-441 (2nd Cir.), *cert. denied*, 359 U.S. 1000, 79 S.Ct. 1138, 3 L.Ed.2d 1030 (1959), the Court held that the Jones Act jurisdiction exists only when there are substantial contacts between the transaction involved in the case and the United States, with substantiality determined on an absolute scale and not by comparing or balancing the presence of certain contacts with the absence of others. *Moncada v. Lemuria Shipping Corp.*, 491 F.2d 470, 472 (2nd Cir. 1974). In determining whether the contacts are substantial the courts have given consideration to the significance attaching to specific contacts. *Id.* In *Lauritzen v. Larsen*, 345 U.S. 571, 583-590, 73 S.Ct. 921, 928-932, 97 L.Ed. 1254 (1953) [hereinafter referred to as *Lauritzen*], the Supreme Court enumerated the following contacts as worthy of consideration: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured; (4) the allegiance of the Defendant shipowner; (5) the place of contract; (6) the inaccessability of a foreign forum; and (7) the law of the forum.

In *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 308-309, 90 S.Ct. 1731, 1733-34, 26 L.Ed.2d 252 (1970) [hereinafter referred to as *Rhoditis*], the Court held that this list is not exhaustive. It decided that the shipowners base of operations is also an important contact and "there well may be others."

Plaintiff is putting much emphasis on the fact that the tort occurred in the United States, where Defendant conducts thirty percent of its business (including 97 specific trips by the TOLUCA as discussed supra). Plain-

tiff cites many cases to support his position that the place of injury within the territorial waters of the United States is in itself sufficient to justify invoking jurisdiction under the Jones Act or General Maritime Law. *The Paula,* 91 F.2d 1001 (2nd Cir. 1937), *cert. denied sub nom. Peters v. Lauritzen,* 302 U.S. 750, 58 S.Ct. 270, 82 L.Ed. 580 (1937); *Hansen v. A. S. D. S. S. v. Endborg,* 155 F. Supp. 387 (S.D.N.Y. 1957); *Nakken v. Fearnley and Eger,* 137 F.Supp. 288 (S.D.N.Y. 1955). Actually, all of such cases hold to the contrary. They hold that injury in United States waters, alone is *insufficient* to support jurisdiction.

The case of *Bartholomew v. Universe Tankships, Inc., supra,* is also heavily relied on by the Plaintiff. In that case, the United States jurisdiction was upheld, but *not alone* on the ground that the injury occurred in the United States waters. It clearly appeared that the foreign flag on the vessel was a flag of convenience, the vessel was owned by United States citizens, and that its base of operation was New York City. Furthermore, Plaintiff had applied for United States citizenship. In the case at bar there was no contention that the TOLUCA was flying a flag of convenience, or that there was any United States ownership. The TOLUCA was wholly owned by Mexican citizens, and the Mexican Federal Government. It was operated from Mexico.

Plaintiff also places great reliance on the *Rhoditis* case and the base-of-operations factor. In *Rhoditis* the beneficial owner was a resident of the United States for eighteen years and conducted the affairs of the corporation from offices in the United States. The ship involved was employed exclusively in, and derived all of its income

from, trade in the United States. Plaintiff, in attempting to place himself within the ambit of this decision, refers to the fact that the vessels of the Defendant did thirty percent of its business in United States ports (including 97 trips made by the M/V TOLUCA). From a reading of the relevant cases the undersigned believes that doing business in, or trading at, a United States port is not the same thing as establishing a base of operations in the United States as set forth in *Rhoditis*. As a leading commentator observed:

> Rhoditis (like Lauritzen) suffers from the customary weakness of any judicial decision. Just as Lauritzen, on its facts, had been almost the weakest possible case for the application of American Law on any theory, so Rhoditis was the strongest possible case for its application on what may be called the 'base of operations' theory . . . While a flat overruling of Rhoditis appears to be unlikely, *extension of the base of operations doctrine to enterprises less clearly linked to the United States appears to be unlikely.*

G. Gilmore and C. Black, *The Law of Admiralty* 475 (2nd ed. 1975), cited in *De Mateos v. Texaco, Inc.*, 562 F.2d 895, 901-902 (3rd Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1449, 55 L.Ed.2d 494 (1978) (emphasis added).

Most cases that supports the base of operations and other similar theories beyond those set forth in *Lauritzen* involve similar facts, that is; (1) the corporations principle place of business is in the United States, (2) the managing or chartering agents are located in the United States, (3) most of the income is derived from cargo either terminating or originating in the United States, (4) expenses of the vessel are paid in the United States,

and (5) the actual management of the corporation is from a United States office. *See: De Mateos v. Texaco, Inc., supra; Antypas v. Cia Maritima San Basilio, S. A.,* 541 F.2d 307 (2nd Cir. 1976); *Mattes v. National Hellenic Am. Lines, S. A.,* 427 F.Supp. 619 (S.D.N.Y. 1977). If these elements are not met the court will dismiss for lack of subject matter jurisdiction.

In *De Mateos v. Texaco, Inc., supra* at 899, jurisdiction was held inapplicable even though United States ownership was involved and the vessels owned by the corporation *"regularly called"* at United States ports (emphasis added).

On the other hand, in *Antypas v. Cia Maritima San Basilio, S. A., supra* at 310, jurisdictional requirements were met since it was found that (1) some of the stockholders of Defendant shipowner were United States citizens, (2) the vessel was operated by a New York agent, who directly controlled the operations of the vessels, and (3) all earnings were collected and all expenses paid in New York.

In *Mattes v. National Hellenic Am. Line, S. A., supra,* the Plaintiff also alleged that the vessel had made many visits to the United States (26 in all) and that *most* of the voyages either originated or terminated in the United States. However, either originated or terminated in the United States. However, jurisdiction was not granted on this factor *alone*. The management and operation of the vessel was centered in New York and at least two American corporations played a significant role in the management of the vessel's affairs.

The base of operations factor is inapplicable here. The principles of *Lauritzen* are still fundamental and most

important in determining whether contacts are substantial. *See De Mateos v. Texaco, Inc., supra* at 901. The law of the flag, the allegiance of the Defendant shipowner, the place of contract, the accessibility of a foreign forum, and the base of operations of the corporation all point away from the application of American law. If we are to justify its application, it must be because, as Justice Douglas suggested in *Rhoditis,* "there well may be other significant factors." The only one referred to is the percentage of the companies operations in the United States and the number of trips that the vessel has made to American ports. In light of the foregoing, these are not substantial enough to find jurisdiction in this case.

Plaintiff has filed an original set of interrogatories with 59 principal questions and over 140 subquestions, a total of 109 interrogatories, which Defendant has answered. Plaintiff filed an additional second set of interrogatories, consisting of 24 questions with 6 subparts, a total of 30 interrogatories, which, as Defendant has alleged, required voluminous research and great expense to answer. Defendant answered these interrogatories on August 21, 1978. Defendant served interrogatories on the Plaintiff on June 16, 1978, but said interrogatories remain *unanswered* by Plaintiff. Defendant has stated that Plaintiff has made no request to depose any witness within or without the control of the Defendant. Now, Plaintiff apparently wants more delay to conduct more discovery. Because of the extensive discovery already conducted by Plaintiff since July of 1977, when the complaint was filed, the Magistrate concludes that further discovery is not necessary for a just and proper disposition of the case.

Accordingly, it is RECOMMENDED that Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction be Granted.

The Clerk will file this instrument and transmit a copy to each party or counsel. Within ten days after receipt of the copy, a party may file with the Clerk, and serve on all parties, written objections, pursuant to Local Rule 24 and 28 U.S.C. § 636(b)(1)(C).

Done at Houston, Texas, this 6th day of April, 1979.

APPENDIX 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

B-76-230 CA

JACK FISHER, ETC., ET AL

v.

THE AGIOS NICOLAOS V, ET AL

—Consolidated With—

B-76-288 CA

EUGENIA KEPESSIDIS, Individually, Etc., ET AL

v.

S/S AGIOS NICOLAOS V, ET AL

On the 18th day of August, 1977, a motion by plaintiffs to quash notice of discovery depositions issued by defendants herein came on for hearing and the Court, being of the opinion that the motion to quash is well-founded:

IT IS ORDERED that the motion to quash the notice of the discovery depositions of plaintiffs be and it is hereby granted, and the notice of depositions previously issued by defendants is quashed, Rule 26(c)(2), Federal Rules of Civil Procedure; *Hyam v. American Export Lines, Inc.*, 213 F.2d 221 (2nd Cir., 1954); *Ford v.*

Urania Transportation, Inc., 168 F. Supp. 240 (N.Y. 1958).

IT IS FURTHER ORDERED that, in accordance with the discretionary authority vested in this Court, Rule 26(c)(2), F.R.C.P.; *Gibson v. International Freighting Corporation*, 1973 F.2d 591 (3d Cir., 1949), certiorari denied, 338 U.S. 832, 70 S.Ct. 78, that if defendants should desire to take discovery depositions of witnesses in Greece, defendants shall be required to advance to United States counsel of record for plaintiffs herein necessary and reasonable travel and subsistence expenses for one attorney for plaintiffs, such expenses to be taxed as costs of these proceedings.

Also presented for hearing before the Court was the motion filed by defendants requesting the Court to decline personal jurisdiction under the doctrine of *forum non conveniens* and the Court, being of the opinion that the motion should be denied:

IT IS ORDERED that the motion for the defendants to decline personal jurisdiction on grounds of *forum non conveniens* is overruled. A suit in admiralty between foreigners is within the jurisdiction of the District Courts of the United States, U. S. Constitution Article III, Sec. 2; *Belgenland v. Jensen*, 114 U.S. 355 (1885). Not only does jurisdiction exist, but it will be exercised "unless special circumstances exist to show that justice would be better subserved by declining it." *Id.* at 366. See also *Gkiafis v. S/S YIOSONAS*, 387 F.2d 460 (4 Cir., 1967); *Heredia v. Davies*, 12 F.2d 500 (4 Cir., 1926.)

Retention of jurisdiction in a suit between foreigners in admiralty then becomes a matter of the discretion of

the district court judge carefully weighing the matter in light of numerous criteria which would tend to render the United States forum appropriate, *Lauritzen v. Larsen,* 73 S.Ct. 921 (1953). No single factor is or should be definitive in the Court's discretionary retention or rejection of jurisdiction in such cases, but rather the entire overview of an individual case considered, *Hellenic Lines v. Rhoditis,* 90 S.Ct. 1731 (1970); *Mpiliris v. Hellenic Lines,* 440 F.2d 1163 (5 Cir., 1972); *Bartholomew v. Universe Tankships,* 263 F.2d 437 (2 Cir., 1959.)

In the case at bar, the combined weight of such factors as the origin of the claimants' cause of action having been an explosion and fire in a United States port, *Erazo v. M/V CUIDAD de NEIVE,* 270 F.Supp. 211 (D.C. Md. 1967); see also *Gkiafis,* supra, investigations have been undertaken by the United States Coast Guard, the Beaumont Fire Department, and United States medical authorities, *Dutta v. Clan Graham,* 1975 AMC 2509 (4 Cir., 1975), *Gkiafis,* supra, *Conte v. Flota Mercante,* 277 F.2d 664 (2 Cir., 1960), *S.S. FLETERO v. Arias,* 206 F.2d 267 (4 Cir., 1953), *Erazo,* supra, *Sfiridas v. Santa Cecilia Company,* 1966 AMC 2295 (E.D.Pa. 1966), *Katelouzos v. Othez,* 176 F.Supp. 954 (E.D.Va. 1959), and counsel having been employed by the plaintiff with substantial and expensive steps toward adjudication having already been undertaken, *Dutta,* supra, *Gkiafis,* supra, *Conte,* supra, *Fletero,* supra, all direct the Court's decision toward a retention of jurisdiction.

Additionally, the factor that a bona fide wage claim has been alleged by plaintiff pursuant to 46 U.S.C. 596 compels the Court to retain jurisdiction over this particular controversy, *Monteiro v. Soc. Mar. San Nicholas,* 280

F.2d 568 (2 Cir., 1963), notwithstanding the fact that such controversy is between two foreign parties, *Strathhearn v. Dillon,* 252 U.S. 348. Judicial economy and fairness to all parties dictate that all remaining claims be disposed of together in a trial on the merits of the entire dispute, *Dutta v. Clan Graham,* 1975 AMC 2509 (4 Cir., 1975), *Bekris v. Aristoteles,* 437 F.2d 219 (4 Cir., 1971), *Conte v. Flota Mercante,* 277 F.2d 664 (2 Cir., 1960.)

The burden of showing *forum non conveniens* is on the party alleging inconvenience, and unless the balance is strongly in favor of such alleging party, the plaintiff's choice of forum should rarely be disturbed. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947.) In the case at bar, respondents' ship is registered in Liberia, has ownership vested in parties in Greece, and conducts business in many countries of the world, including the United States. Respondents have not met the burden of proof in showing that this Court is an inappropriate forum to decide the merits of this case.

Accordingly, respondents' motion to decline jurisdiction is overruled.

IT IS FURTHER ORDERED that the parties disclose to one another the names and addresses of witnesses whom they may use at trial herein and that such information be incorporated in the pretrial order to be filed by September 1, 1977.

IT IS FURTHER ORDERED that the above numbered and entitled consolidated proceedings be and they are hereby assigned for trial on the 5th day of December, 1977.

IT IS FURTHER ORDERED that plaintiffs and defendants each advise respective opposing counsel, no later than two weeks before trial, the identity and location of each witness from abroad who will be brought to the United States for trial.

ORDER ENTERED on this 28th day of November, 1977.

/s/ JOE J. FISHER
Judge, United States District Court

APPROVED AS TO FORM:

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APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-230-CA

JACK FISHER, PERSONAL REPRESENTATIVE
OF THE ESTATE OF DIMITRIOS KEPESSIDIS

v.

THE AGIOS NICOLAOS V, ET AL

CONSOLIDATED WITH

CIVIL ACTION NO. B-76-288-CA

EUGENIA KEPESSIDIS, INDIVIDUALLY,
ETC., ET AL

v.

S/S AGIOS NICOLAOS V, HER ENGINES,
TACKLE, ETC., IN REM, ET AL

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Attorneys for Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a suit for damages for the alleged wrongful death of Dimitrios Kepessidis, brought by his surviving widow, minor child, parents and two brothers and sisters. Plaintiffs predicate their claim on the general maritime law of the United States and the Jones Act, 46 U.S.C. § 688. Trial has been completed and the matter extensively briefed by both sides, and after due consideration, the Court submits the following findings of fact and conclusions of law.

FINDINGS OF FACT

1.

Dimitrios Kepessidis, a citizen of Greece, was hired as the chief engineer for the ship, M/V AGIOS NICOLAOS V, and was flown to Beaumont, Texas, to join the vessel on May 22, 1976.

2.

The AGIOS NICOLAOS V is a Greek flag-flying and Greek registered vessel owned by defendant, Valsky Maritime, Ltd. (Valsky), a Liberian corporation, and is operated by Valmas Brothers Shipping S.A., (Valmas), a Panamanian corporation. Valsky purchased the aforementioned vessel on or about April 4, 1976, from a Swedish vendor. This was the only ship owned by Valsky. The vessel was placed in dry dock in Cadiz, Spain, for necessary repairs and alterations, where it remained for several weeks, until it commenced its maiden voyage with its new owner during the first part of May of 1976 from Cadiz to Beaumont. The ship sailed to Beaumont without any cargo and its first business venture was to pick up a load of corn at the Continental Grain Elevator and to transport that cargo to the Soviet Union.

3.

Most of the crew joined the ship in Spain, with the notable exception of Chief Engineer Kepessidis. In his place was a Swedish chief engineer who sailed with the ship on its first voyage across the Atlantic for the purpose of familiarizing the Greek crew with the ship's operation. The Swedish chief engineer left the ship on May 26,

1976, or less than four full days after Chief Engineer Kepessidis joined the ship.

4.

The ship was equipped with two auxiliary boilers, which boilers were used solely for the purpose of generating the necessary steam to run certain steam-operated equipment, but which boilers were not used as the main propulsion system for the ship (instead a large diesel engine provided that source of power). Even though both of these auxiliary boilers were automatic at the time of their manufacture and placement aboard the ship in Sweden, with the result that it would not be necessary manually to light the boilers, these automatic features were not working at the time Valsky took possession of the ship, and Valsky made no effort to have these boilers repaired so as to return them to their automatic functioning capability. Because these boilers were initially designed to be automatic rather than manual, they were not equipped with the usual large sight glass or other means of permitting an operator to inspect the furnace of the boiler visually to ascertain whether any problem existed. These automatic boilers, accordingly, once they had been reduced to manual operation, lacked this safety feature which normally accompanies manually-designed boilers.

5.

The controls for these auxiliary boilers were not labelled in Greek, but instead were labelled only in Swedish. The operations manual and instruction manuals pertaining to these boilers were likewise available only in the Swedish language.

6.

On the initial voyage from Spain to Beaumont only the port auxiliary boiler was used, because it was easier for the operator to light the port boiler, rather than the starboard boiler, since one control operated both the fuel and the ignition spark therefore, whereas in order to light the starboard boiler, it would be necessary for the operator to attempt to manipulate two controls, one with each outstretched arm and hand, at the same time.

7.

Shortly after the departure of the Swedish chief engineer trouble was encountered. In particular on the evening of May 28, 1976, the port boiler exploded. It was only after the port boiler was thereby rendered inoperative that any attempt was made to use the starboard auxiliary boiler. Chief Engineer Kepessidis, accordingly, received no instruction or guidance from the Swedish chief engineer with respect to the starboard auxiliary boiler and its mode of operation. Indeed, the Court finds that Chief Engineer Kepessidis, in the short period of time that he was aboard the vessel before the first boiler explosion occurred, and even during the shorter period of time that he was aboard the vessel before the Swedish chief engineer departed, did not have much of any opportunity whatsoever to become familiar with any aspects of the ship's engines and other equipment.

8.

When the starboard boiler was initially lit following the port boiler explosion, the starboard boiler exhibited a low grade type explosion which scared the engineers, oilers and other engine room personnel. Mr. Skiadas,

the technical expert for the defendant shipping company who accompanied the vessel from Spain, however, chided the engine room personnel for being afraid of the starboard boiler and ordered them to continue their work with it and their use of it. Mr. Skiadas was really higher in the chain of command than Chief Engineer Kepessidis, being the direct company representative.

9.

At around 11:10 a.m. on June 1, 1976, the starboard auxiliary boiler exploded or backfired while the oiler, John Papageorgiou, was attempting to light it. Mr. Papageorgiou testified that he had been trained by Third Engineer Vatikiotis and had received no instruction from Chief Engineer Kepessidis. Mr. Papageorgiou had previously lit the boiler at around 10:30 a.m., at which time it had taken him two attempts to ignite the boiler. The boiler had remained fired until around 10:45 a.m., at which point the requisite steam pressure had been restored whereupon Mr. Papageorgiou turned off the furnace to the boiler. The steam pressure had dropped and Mr. Papageorgiou had received a communication from Second Engineer Pados to light the boiler again to restore the necessary steam pressure. In response to this instruction Mr. Papageorgiou replenished the water supply and was getting ready to light the boiler again when Chief Engineer Kepessidis came into the engine room.

10.

Chief Engineer Kepessidis happened to come into the engine room at this particular time, not for purposes of supervising or examining the operation of the starboard auxiliary boiler, but instead solely for the purpose of

inspecting the area where the repaired turbine to the main diesel engine was going to be lowered down into the engine room from the overhead open shaft space. Mr. Papageorgiou approached Chief Engineer Kepessidis and told him that it had taken two attempts to ignite the starboard boiler. Mr. Papageorgiou then testified that Chief Engineer Kepessidis came over to the area where Mr. Papageorgiou would stand to attempt to ignite the starboard boiler. Mr. Papageorgiou activated the ventilator or purge fan, which would remain continuously in operation. In time then he and Chief Engineer Kepessidis simultaneously operated the necessary controls, one being operated by Mr. Papageorgiou and the other by Chief Engineer Kepessidis. In particular, Chief Engineer Kepessidis activated the fuel switch, while simultaneously Mr. Papageorgiou pressed the ignition switch or rod in order to emit the spark to ignite the aerated fuel mixture which would enter the furnace. When the boiler did not ignite, Mr. Papageorgiou and Chief Engineer Kepessidis simultaneously de-activated the respective controls. They waited for ten to twenty seconds before attempting the procedure again, and again without success, whereupon they both simultaneously de-activated their respective controls. Thereafter, Mr. Papageorgiou, after waiting another ten to twenty seconds, attempted simultaneously to activate both controls on the third attempt to light the boiler, but again without success. Mr. Papageorgiou then made a fourth attempt, which fourth attempt was, according to his testimony, possibly a little bit longer in duration than any of the three previous attempts, but again when the boiler did not ignite, he turned off the fuel switch and retracted the ignition rod or lever. While he was retracting the ignition rod an explosion and fire erupted in the furnace.

11.

Mr. Papageorgiou further testified that on his prior attempt to ignite the starboard boiler around 10:30 a.m., he experienced a dull roaring noise. He further testified that he and other engine room personnel had experienced such a dull roaring noise on an intermittent basis from the starboard boiler once it would ignite, which noise they did not experience with the port boiler. This noise likewise scared the engine room personnel, but again they were chided and ridiculed for their fears by Mr. Skiadas and by Second Engineer Pados and were told to continue to use the equipment. Mr. Papageorgiou further stated that he did not believe that Chief Engineer Kepessidis was aware of this dull roaring noise problem with the starboard boiler and Mr. Papageorgiou never made any effort specifically to report it to Chief Engineer Kepessidis because of what he and the other workers had been told by Second Engineer Pados and the special company representative, Mr. Skiadas. Indeed, Mr. Papageorgiou, for those reasons, did not report to Chief Engineer Kepessidis that he had experienced the dull roaring noise during his lighting of the starboard boiler around 10:30 a.m., immediately before the accident, even though he testified the noise which he heard at that time was probably the loudest that he had heard the starboard boiler make. There is no evidence to indicate that Chief Engineer Kepessidis was aware of this problem.

12.

Dr. David French, recognized as an expert in marine engineering, gave his opinion that the low grade explosion and the dull roaring noise were probably attributable

to a defective fuel valve which permitted an excessive amount of fuel to leak into the furnace of the boiler during ignition attempts. The Court finds Dr. French's testimony and conclusion well-reasoned and supported by the evidence.

13.

The ventilator fan or purge fan would be able to remove in the time span allowed between attempts to fire the starboard boiler the anticipated quantities of aerated fuel or gas so as not to create any expected danger, but this fan would not be able likewise to eliminate any unanticipated leakage of unaerated fuel attributable to a defective fuel valve or other defective equipment.

14.

There was nothing unusual or extraordinary about requiring as many as four attempts to ignite the starboard boiler, nor was there anything unusual about it requiring two attempts to ignite the boiler as had happened on the previous occasion. Frequently, it would take the oiler, such as Mr. Papageorgiou, as many as five or six successive attempts to ignite the port boiler. Mr. Papageorgiou testified he had never been instructed to wait as long as a minute or more between attempts to light either the port boiler or the starboard boiler.

15.

There was nothing intrinsically wrong with the work method being used by Mr. Papageorgiou at the time he attempted to ignite the starboard boiler in the presence

of Chief Engineer Kepessidis. His waiting only ten to twenty second between attempts to ignite the boiler, under the sircumstances of the type of fuel being used in the boiler and the fact that the boiler was hot, was an acceptable work method, at least to the extent that Chief Engineer Kepessidis cannot be faulted for not having ordered Mr. Papageorgiou to cease and desist his attempts when the boiler did not ignite initially.

16.

It would take at least twenty to thirty minutes to disassemble the bolted front of the furnace in order to examine the inside thereof to ascertain whether anything was wrong, and it was not reasonable to expect Chief Engineer Kepessidis to require the oiler, Mr. Papageorgiou, to undertake such inspection, particularly since the vessel was already behind schedule.

17.

The defendants' vessel and its equipment were unseaworthy in that the starboard auxiliary boiler had a defective leaking fuel valve and defective equipment, in that the boiler was having to be operated and attempted to be ignited on a manual basis when the equipment was designed to be automatic but which automatic features had broken down and had not been repaired despite reasonable opportunity for such repair, in that the boiler was not equipped with an adequate sight glass or other safety device to accord an operator a reasonable opportunity to inspect the furnace for possible leaking fuel oil, in that the controls, operations manuals, etc., were all in Swedish rather than in Greek, and in that the crew

was not given proper training, instructions and experience in the proper and safe method to operate these automatically designed boilers in a manual fashion. This unseaworthiness proximately caused the accident resulting in the death of the late Mr. Kepessidis.

18.

The defendants were negligent in causing or permitting the various unseaworthy conditions as set forth herein to exist and in failing to provide plaintiffs' decedent with a safe place to work, which negligence proximately caused the accident resulting in the death of Mr. Kepessidis.

19.

After the explosion and fire started all of the engine room personnel abandoned their posts and fled for safety with the exception of Third Engineer Poporos and Chief Engineer Kepessidis. Chief Engineer Kepessidis tried to fight the fire and yelled for a fire extinguisher. In response to this command, Third Engineer Poporos grabbed a fire extinguisher, which had the shape, size and configuration of a liquid fire extinguisher, which he therefore turned upside down and struck on the floor in order to operate, but which fire extinguisher did not work. The Court finds that the fire extinguisher did not work because it was either broken or empty, and had the fire extinguisher which Third Engineer Poporos grabbed been working properly, the fire at that time could probably have been extinguished or at least brought under sufficient control that the death of Chief Engineer Kepessidis would not have ensued.

20.

Following the fire there was utter bedlam and confusion aboard ship. There had been no fire drills whatsoever since this crew had joined the ship, with the result that nobody knew exactly what should be done. Shortly thereafter the decision was reached by the Captain of the ship and the Port Captain to activate the CO_2 system. No attempt was made to take an actual head count of the ship's personnel, or at least of the personnel who would have been in the engine room, to make sure that all of the engine room personnel had reached safety before shutting up the engine room and activating the CO_2 system.

21.

Fire resistant clothing was available aboard the ship but no attempt was made by the Captain to use such fire resistant clothing so as to gain access to the engine room area where the fire and its source of fuel was located so as to shut off the fuel supply and to rescue any persons located in the engine room.

22.

There was no real emergency existing which required the hasty resort to utilization of the CO_2 system.

23.

Once the CO_2 system was activated and the automatic siren sounded, Chief Engineer Kepessidis tried to scramble to safety, but the convection currents caused the released CO_2 to cause him to suffocate. After he sustained severe pain and suffering, mental anguish and distress and fear of dying, he finally was overcome by the carbondioxide,

which in combination with the smoke, ultimately caused him to die later that day from suffocation.

24.

The vessel was, accordingly, likewise unseaworthy in that the fire extinguisher did not function properly in the engine room and in that the crew had not been trained in proper fire drill procedures, which unseaworthiness proximately caused the death of Mr. Kepessidis.

25.

The defendants were likewise negligent in failing to assure that all fire extinguishers were functioning properly, in failing to see that proper fire drill procedures occurred aboard ship, in resorting to the CO_2 system when it was unnecessary to do so and in causing the CO_2 system to be activated before any reasonable steps were taken to ascertain that all engine room personnel had reached safety. The defendants were likewise negligent in that no attempt was made to use fire resistant clothing to reach the engine room to cut off the fuel supply for the fire and to rescue any persons located in the engine room. This negligence caused or contributed to the death of the late Mr. Kepessidis.

26.

Following the outbreak of the fire Mr. Kepessidis remained at his post and attempted to fulfill his obligations to safe the ship.

27.

Dimitrios Kepessidis sustained some burns to his body after the fire and explosion, from which he reasonably

experienced pain, but which burns did not contribute to his death.

28.

Mr. Kepessidis was born in 1932 and accordingly 44 years old at the time of his death on June 1, 1976. His widow, Eugenia Kepessidis, was born on November 28, 1943. She and the late Mr. Kepessidis were married on December 26, 1972, and of that marriage one child, Kosmas, was born on March 2, 1974.

29.

Mr. Kepessidis was paid a monthly wage of $750.00 and a yearly wage of $9,000.00. The Court finds that Mr. Kepessidis could have continued to work and earn wages or income for the remaining years of his work-life expectancy of at least the yearly rate of $9,000.00 and his work-life expectancy being 19.8 years would give a gross earnings of $178,200.00. The Court further finds the future earnings discounted would not more than equal the increase in earnings that the deceased in all reasonable probability would have received in the future had he lived and worked his full remaining work-life expectancy.

30.

The Court further finds that Mr. Kepessidis used and would have used one-third of his future earned income for his own personal expenses for the remainder of his work-life expectancy which would have been the amount of $59,400.00 with the remaining 66⅔rds percent of his future earnings, to-wit: $118,800.00, to be awarded equally to the surviving widow and minor child. From

this amount, however, will be deducted the sum of $10,-000.00 which is to be awarded to the surviving father and mother of the deceased.

31.

The Court further finds that the surviving widow sustained a loss of her husband's services at a present discount value of $10,000.00 and that the minor child Kosmas, has sustained a loss of nurture and guidance as a result of the death of his father in the present discounted value of $10,000.00.

32.

The Court further finds that the deceased Mr. Kepessidis left a surviving father, Kosmas Kepessidis, and a surviving mother, Olga Kepessidis, who were partially dependent upon their son and who sustained a loss of contributions from their son in the sum of $5,000.00 each for a total amount of damages of $10,000.00.

33.

The Court further finds that the deceased was also survived by two adult brothers and two adult sisters who were in nowise dependent upon the deceased or could expect to receive any contribution of a pecuniary value.

34.

In addition to furnishing support for his surviving widow and son, the late Mr. Kepessidis continued to furnish partial support for his surviving lawful parents, Kosmas Kepessidis, his father, and Olga Kepessidis, his mother. Dimitrios Kepessidis was a devoted and loving

son to both of his parents, and both have sustained severe and demonstrable loss of his society, love and affection, which loss they will both continue to suffer for the rest of their lives, in addition to the loss of partial support.

35.

Kosmas Kepessidis, the surviving father of Dimitrios Kepessidis, has sustained a loss of partial support and loss of society from the death of his son, past and future, in the present discounted value of $5,000.00.

36.

Mrs. Olga Kepessidis, the surviving mother of Demitrios Kepessidis, has sustained a loss of partial support and loss of society resulting from the death of her son, past and future, in the present discounted value of $5,000.00.

CONCLUSIONS OF LAW

I.

This case is within the Court's admiralty and federal question jurisdiction, 28 U.S.C. § 1333; 46 U.S.C. § 688.

II.

The Court previously concluded and held that it should refuse the motion to decline jurisdiction for the reasons set forth in the order rendered herein on November 28, 1977.

III.

The Court has likewise concluded that an analysis of all relevant factors militates in favor of the application of

American Law to the judicial resolution of this controversy. *Hellenic Lines, Ltd. vs. Rhoditis,* 398 U.S. 306, 90 S.Ct. 1731 (1970); *Mattes v. National Hellenic American Lines, S.A., et al,* 427 F.Supp. 619 (SDNY, 1977). The defendants have a substantial base of operations in the United States and derive substantial revenue from United States trade, freight and charter hire. Accordingly, the American Jones Act, 46 U.S.C. § 688, and the American general maritime law of unseaworthiness are the legal criteria which should be applied herein with respect to a determination of liability, and the American general maritime law as respecting beneficiaries entitled to recover damages and the types of damages recoverable, as particularly exemplified by *Moragne v. State Marine Lines, Inc.,* 398 U.S. 375, 90 S.Ct. 1772 (1970) and *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806 (1974), is the applicable standard with respect to determination of issues concerning damages.

IV.

The findings of fact previously set forth with respect to unseaworthiness and Jones Act negligence were the legal and proximate causes of the death of Dimitrios Kepessidis, thereby warranting imposition of liability upon both defendants without any reduction in damages legally recoverable because of the absence of any actionable contributory negligence on the part of plaintiffs' decedent.

V.

Plaintiffs, Mrs. Eugenia Kepessidis (Kepessidou), and the minor child, Kosmas Kepessidis, are entitled to re-

cover damages from defendants, jointly, in the principal sum of $5,000.00 each for the conscious pain and suffering sustained by the late Dimitrios Kepessidis before his death. *Law v. Sea Drilling Corporation,* 510 F.2d 242 (5th Cir. 1975); *Wiggins v. Lane & Company, Inc., et al,* 298 F.Supp. 194 (EDLa. 1969); *Evans v. Chevron Oil Company,* 438 F.Supp. 1097 (EDLa. 1977).

VI.

Plaintiff, Mrs. Eugenia Kepessidis (Kepessidou), and the minor child, Kosmas Kepessidis, are legally entitled to recover damages from defendants in the sum of $138,-800.00 as described in the above findings of fact.

VII.

Plaintiff, Kosmas Kepessidis, the lawful surviving father of the late Dimitrios Kepessidis, is legally entitled to recover from defendants, the sum of $5,000.00 for the loss of services and contributions which he sustained as a result of the wrongful death of his son.

VIII.

Plaintiff, Olga Kepessidou, the lawful mother of the late Dimitrios Kepessidis, is legally entitled to recover from defendants, the sum of $5,000.00 for the loss of services and contributions which she sustained as a result of the wrongful death of her son.

IX.

That the surviving brothers and sisters of the late Dimitrios Kepessidis are not entitled to recover damages as a result of their brother's wrongful death.

X.

In the discretion of the Court all of the aforementioned awards of damages shall likewise bear pre-judgment interest at the legal rate in Texas from date of death, June 1, 1976, until paid. *Cf. Higginbotham v. Mobil Oil Corporation,* 360 F.Supp. 1140, 1150 (W.D. La. 1973), and cases cited therein.

XI.

Defendants, Valsky Maritime, Ltd., and Valmas Brothers Shipping, S.A., are likewise taxed, jointly and in solido, with all costs of these proceedings.

XII.

To the extent that any of the preceding findings of fact constitute conclusions of law they are adopted as such, and to the extent that the preceding conclusions of law constitute findings of fact, they are adopted as such.

XIII.

Judgment will be rendered in accordance with said findings and conclusions.

SIGNED and ENTERED this the 11th day of October 1978.

/s/ JOE J. FISHER
United States District Judge

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-230-CA

JACK FISHER, PERSONAL REPRESENTATIVE
OF THE ESTATE OF DIMITRIOS KEPESSIDIS

v.

THE AGIOS NICOLAOS V, ET AL

CONSOLIDATED WITH

CIVIL ACTION NO. B-76-288-CA
EUGENIA KEPESSIDIS, INDIVIDUALLY,
ETC., ET AL

v.

S/S AGIOS NICOLAOS V, HER ENGINES,
TACKLE, ETC., IN REM, ET AL

JUDGMENT

This matter was tried on the merits pursuant to regular assignment, at the conclusion of which trial the matter was extensively briefed by counsel for all parties and the case submitted to the Court for adjudication. In accordance with the findings of fact and conclusion of law previously rendered, signed and filed of record, judgment is rendered as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Mrs. Eugenia Kepessidis (Kepessidou), individually, and against defendants, Valsky Maritime, Ltd. and Valmas Brothers Shipping, S.A., jointly and in solido, in the total principal sum of Sixty-nine Thousand Four Hundred Dollars ($69,400.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Mrs. Eugenia Kepessidis (Kepessidou), as natural tutrix and legal guardian of the estate of her minor son, Kosmas Kepessidis, and against the aforementioned defendants, jointly and in solido, in the principal sum of Sixty-nine Thousand Four Hundred Dollars ($69,400.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Kosmas Kepessidis, individually, and against the aforementioned defendants, jointly and in solido, in the principal sum of Five Thousand Dollars ($5,000.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Mrs. Olga Kepessidou, individually, and against the aforementioned defendants, jointly and in solido, in the principal sum of Five Thousand Dollars ($5,000.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pre-judgment interest at the legal rate in Texas (nine per cent [9%] per annum) be awarded to all the aforementioned plaintiffs from the date of death, June 1, 1976, until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of these proceedings be and they are hereby assessed against the aforementioned defendants, jointly and in solido.

JUDGMENT RENDERED AND SIGNED on this 6th day of December, 1978.

/s/ JOE J. FISHER
United States District Judge

APPENDIX 6

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 79-1103

D. C. Docket No. B-76-230-CA & B-76-288-CA

JACK FISHER, Etc.,
Plaintiff-Appellee,

versus

THE AGIOS NICOLAOS V, ET AL.,
Defendants-Appellants.

* * * * *

EUGENIA KEPESSIDIS, INDIVIDUALLY, ETC., ET AL.,
Plaintiffs-Appellees,

versus

THE AGIOS NICOLAOS V, Etc., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

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Before MORGAN, CHARLES CLARK and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to the plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 10, 1980

Issued as Mandate:

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-76-203-CA

NICOLAOS DENAXAS, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF NASSOS STAHTAS

v.

VALMOS BROTHERS SHIPPING S.A., ET AL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-76-298-CA

POPOROS VASSILIOUS

v.

VALSKY MARITIME, LTD.,
THE AGIOS NICOLAOS V,
AND VALMOS BROTHERS SHIPPING S.A.

DEPOSITION OF CHRISTOFIS VALMAS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-76-230-CA

JACK FISHER, ETC., ET AL

v.

THE AGIOS NICOLAOS V, ET AL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-76-298-CA

EUGENIA KEPESSIDIS, INDIVIDUALLY,
ETC., ET AL

v.

S/S AGIOS NICOLAOS, ET AL

DEPOSITION OF CHRISTOFIS VALMAS

DEPOSITION AND ANSWERS of Christofis Valmas, called as a witness by the defendants, taken before Roger Rehorn, a notary public in and for Harris County, Texas, taken at No. 3 Akti Miaouli, Piraeus, Greece, on the 19th day of September, 1977, between the hours of 5:30 p.m. and 7:35 p.m., pursuant to Notice and the following stipulation and waiver of counsel.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties hereto that this deposition is taken pursuant to the paragraphs below, numbered 2, 3 and 4.

(1) That the deposition of the witness named in the caption hereto may be taken at this time and place before the herein named notary public of Harris County, Texas; time and Notice being waived; and that the said deposition, or any part thereof, when so taken, may be used on the trial of this cause with the same force and effect as if the witness were present in court and testifying in person.

(2) That the necessity for the witness reading this deposition and signing same is waived.

(3) That the necessity for preserving objections at the time of taking is waived, and that any and all legal objections to this deposition, or any part thereof, may be urged at the time same is sought to be offered in evidence on the trial of this cause.

(4) That formal notification of filing is waived.

(5) That the witness shall read and sign this deposition before any notary public.

(6) That the necessity for preserving objections at the time of taking is waived, and that any and all legal

objections to this deposition, or any part thereof, may be urged at the time same is sought to be offered in evidence on the trial of this cause; except, however, that objections to the form of the questions and/or responsiveness of the answers must be made at the time of taking, or else such objections are specifically waived.

(7) That the notary may swear the witness with the same force and effect as if he were a notary of _____ County, Texas.

(8) That the witness shall read and sign this deposition before any notary public prior to the commencement of trial.

APPEARANCES

Mr. Paul H. Due, of the law firm of Messrs. Due, Dodson & DeGravelles, 442 Europe Street, Baton Rouge. Louisiana, appearing for the plaintiffs.

Messrs. Bryan F. Williams, Jr., and Robert S. DeLange, of the law firm of Messrs. Royston, Rayzor, Vickery & Williams, Cotton Exchange Building, Galveston, Texas, appearing for the defendants.

ALSO PRESENT: Rea Manidaki
Evangelos Tsouroulis

INTERPRETER: Argine Carter

I, Roger Rehorn, a notary public in and for Harris County, Texas, may swear the witness just as if we were taking this testimony in Harris County, Texas, with the same force and effect, and it can be used for all purposes just as if I were swearing the witness in Harris County, Texas.

ARGINE CARTER

was duly sworn by the notary to act as interpreter.

(All questions and answers are through the interpreter unless otherwise indicated.)

CHRISTOFIS VALMAS,

was called as a witness by the defendants and, being first duly sworn by the notary, through the interpreter, testified as folows:

DIRECT EXAMINATION

Questions by Mr. Williams:

Q. Mr. Valmas, you have given your full name and address to the reporter, have you not?

A. Yes.

Q. And, as you know, my name is Williams and I am representing your companies in a lawsuit that is pending in Beaumont, Texas. You are generally famliar with the fact that those suits are pending against your companies in Beaumont, are you not?

A. Yes.

Q. You realize, also, Mr. Valmas, that Mr. Due, here, who I introduced to you before we began, is here representing the widow of Mr. Kepessidis, the widow of—

THE INTERPRETER: Excuse me. Can we do the widows one at a time? It's just a matter of making sure I get the names right.

MR. WILLIAMS: Oh, I see. Surely.

Q. (By Mr. Williams) . . . the widow of Mr. Stahtas; and Mr. Poporos. Finally, you understand that since you are testifying this afternoon under oath, your testimony will be transcribed by this gentleman?

A. Yes.

Q. . . . filed with the court in the United States?

A. Yes.

Q. . . . and will be used just as though you were giving evidence in a United States District Court?

A. Yes.

Q. What is the nature of your business, Mr. Valmas?

A. It is a shipping concern.

Q. Are you connected with Valmas Brothers?

A. It is a family concern between brothers.

Q. And are you connected with another company, Valsky Maritime, Ltd.?

A. The Valsky Company is the one that owns the ship, the AGIOS NICOLAOS, the name of the ship in question; and the other company is the operating company.

Q. Now, would you tell us with respect to Valmas, first, who owns that corporation?

A. It's a family concern between brothers.

Q. Will you name the brothers who are stockholders owning that corporation?

A. Nicholas Valmas, Christopher Valmas, Dimitris Valmas. So, three brothers; Nicholas, Christopher and Dimitris Valmas.

Q. And those three brothers of whom you are one own one hundred percent of the stock of Valmas. Is that correct?

A. Yes. There is no other stockholder or partner.

Q. Now, Mr. Valmas, I think it would be better, since we are using an interpreter, if you let her interpret for you, even though some questions you may understand directly in English. If we do it all one way, we will probably move faster than if you answer some in English and, then, wait for the others. Okay?

Now, do the three Valmas brothers own the stock of the corporation for their own account, or do they in any way hold any of the trusts for others?

A. No. They belong, outright, for themselves. There is no holding. They do not hold them for anybody else.

Q. Who are the officers of Valmas?

A. The three brothers.

Q. Do you know the positions that each holds?

A. Nicholas Valmas is the president, Christofis Valmas is the vice president; the treasurer is Dimitris Valmas.

Q. Where is Valmas, Incorporated? Under the laws of what company?

A. Valmas Brothers Shipping, S.A., which is the full name, I believe—

MR. WILLIAMS: Ask him if that is the full name.

A. Yes, this is the name of the Greek company, the operating company.

Q. Now, I go back to my question, so the record will be clear. Now, wait a minute. We have got to get the two corporations straight. I'm talking about, first, Valmas Brothers Shipping, S.A.

A. Yes.

Q. Where is that corporation originated, under what law is that corporation chartered?

A. It has been registered in Greece and is under Greek law.

Q. Under what law was the charter?

A. According to Greek law. It has been chartered according to Greek law.

Q. Mr. Valmas, is it not a fact that that corporation is incorporated under the laws of the Republic of Panama?

A. I make a mistake.

There is another company which is called Valmas Shipping Company which has been incorporated, which owned ferry boats, which was incorporated under Panama law—under Greek law.

Valmas Brothers Shipping Company is a Panama company. It's chartered under the laws of Panama.

Q. And that is the company that was operating the AGIOS NICOLAS V?

A. The mistake occurred because we used to own another Greek company that ran ferry boats, which we do no longer own, and which used to travel inside Greece.

Q. Now then, insofar as Valsky Maritime, Ltd., is concerned—

MR. DUE: Excuse me.

(Discussion off the record.)

Q. (By Mr. Williams) Mr. Valmas, because of the confusion about the company that used to own the ferry boats, I'll ask you one time, again, to name the shareholders of Valmas Brothers Shipping, S.A.?

A. The three brothers.

Q. The same three brothers?

A. Yes.

Q. And they own one hundred percent of the stock?

A. There are no other stockholders.

Q. And insofar as you know, they are the officers and hold the offices in that corporation that you have described?

A. Yes.

Q. And that corporation is incorporated under the laws of the Republic of Panama?

A. Yes.

Q. All right. Now, we turn to Valsky Maritime, Ltd. Under what law is that corporation incorporated?

A. It's under Liberian law.

Q. And who are the stockholders of that corporation?

A. The same three brothers.

Q. Who are the officers of that corporation?

A. The same three brothers.

Q. Do they hold the same offices in that corporation as they do in Valmas?

A. Yes, they hold the same titles, same positions.

Q. Now, you have already testified that Valsky, during the month of May and June of 1976, owned the AGIOS NICOLAOS V. Is that correct?

A. Yes. And this is still the case. It still owns that ship.

Q. When did you acquire that ship?

A. If I remember correctly, it was sometime in February or March of 1976. I do not remember exactly.

Q. All right. And you have owned it continuously since that time?

A. There have been no changes from the day that we took it over.

Q. Does Valsky Maritime, Ltd., own any other seagoing vessels?

A. It owns no other seagoing vessels except for the AGIOS NICOLAOS.

Q. Does Valmas operate any vessels other than the AGIOS NICOLAOS?

A. You mean, Valmas Brothers?

Q. Valmas Brothers.

A. Yes, certainly, they own ships, again.

Q. Now, what ships do they operate?

A. AGIOS NICOLAOS, MARIANA, RINOULA—four ships: AGIOS NICOLAOS, MARIANA, RINOULA and VALMAS.

MR. DUE: Would you spell those for me, please? I mean, I know the AGIOS NICOLAOS.

THE WITNESS: Okay. The second is MARIANA, M-A-R-I-A-N-A; the third one is RINOULA, R-I-N-O-U-L-A; and the fourth one is VALMAS, V-A-L-M-A-S.

MR. WILLIAMS: I believe, so that there will be no question, counsel, MARIANA is spelled with two N's.

(Discussion off the record.)

MR. WILLIAMS: Oh, I beg your pardon. I'm sorry.

MR. DUE: Okay.

Q. (By Mr. Williams) Now, under what law are those three vessels registered?

A. They are registered under Greek law, and they carry the Greek flag.

Q. During a period of, say, five years prior to May the 28th, 1976, had Valmas Brothers operated any vessels other than the four you have told us about?

A. Valmas Brothers always ran their own ships, but in the past they have also had other ships that have since been sold.

Q. Yes. Now, just during the five years before—

THE INTERPRETER: I'm sorry. Didn't you say prior to the 28th of May?

MR. WILLIAMS: Yes. I said, prior to the 28th of May, 1976, what ships, in addition to the ones he has already told us about, have they operated during the past five years?

A. (Continuing) There was the AGIOS NICOLAOS IV.

Q. (By Mr. Williams) Excuse me.

Now, what has happened to that ship?

A. It was sold for scrap.

Q. All right, sir. During the time you operated it—

A. There was another one called VALMAS which was also sold for scrap. There was another one called ANTONIS which was also sold. Some other Greeks bought it.

Q. During the period of time that you operated those three vessels that are now gone, under what flags, flag or flags, were they registered?

A. The AGIOS NICOLAOS and the VALMAS, under Greek flag, and the ANTONIS was under the Lebanese flag. We also owned Greek ships, those ferry boats, which we have since sold.

Q. Fine. All right.

Now, returning to the ships that you presently operate, the four that you presently operate, which of those ships

during the five-year period before May the 28th, 1976, had called at ports in the United States?

A. I do not remember, exactly, but the MARIANA had called in the United States and, possibly, the AGIOS NICOLAOS, but I am not sure. I cannot remember.

MR. DUE: Which AGIOS NICOLAOS are we talking about?

THE WITNESS: No. IV.

MR. DUE: Okay.

Q. (By Mr. Williams) Prior to May the 28th—

A. I am not at all sure about the other ships, but I know that the MARIANA called in the United States.

Q. Now, when you were operating these ships, do you operate them as what is commonly known in the industry as tramp vessels?

A. Yes.

Q. . . . as distinguished from vessels that make regular calls, advertised calls, at ports, which are called liners?

A. No.

Q. And you have never operated liner service with any of these ships?

A. No, never.

Q. Now, state whether or not your method of operation is to obtain a charter on each of the ships; that is, to get some company to, in effect, rent from you a ship for a voyage or voyages or for a certain period of time? Is that the principal way you operate?

A. These ships were either under time charter or were on ordinary trips under their own operation, voyage

charters. So, they were either time charter or voyage charter.

Q. All right. That means, for the benefit of the court, that someone else comes along and rents, in effect, hires your ship either for a certain period of time, such as six months or a year, or to make a particular voyage or series of voyages?

A. Yes, that, also, can be done.

Q. Well, is that what is done? That's the way—

A. Yes, this is what is done.

Q. All right. So, when a ship is under charter, who decides where the ship is going to go?

A. The person who has chartered it decides where the ship is going to go.

Q. Now, Mr. Valmas, has either Valmas or Valsky ever maintained any type of branch office or general agency in the United States of America?

A. There were no branch offices in the United States, nor were there any agents.

Q. From what point are the operating orders sent to the ships that are owned by Valsky or operated by Valmas Brothers?

THE INTERPRETER: Mr. Valmas is asking what kind of orders. For instance, the orders of travel would be sent by the charter party, the person, but he is not quite clear on what you mean.

Q. (By Mr. Williams) No.

If the master of the ship needs any sort of operating instructions from Valmas or Valsky, where do these instructions come from? Do they come from some office somewhere else, or where do they come from?

A. The orders leave from Piraeus in Greece.

Q. And they go directly to the ship from Piraeus?

A. And they go directly to the ship from Piraeus.

Q. Now then, has either Valmas or Valsky ever advertised its vessels as being available through any sort of newspaper or commercial services, of any sort, in the United States of America?

A. No, no direct advertising has ever been made, but these ships are rented through agents.

Q. Brokers?

THE INTERPRETER: Brokers. Thank you.

Q. Does either Valmas or Valsky carry on any other business than the owning and operating of these ships?

A. No, they are not involved in any other business.

Q. Of what citizenship are the officers of the ships owned by Valsky and operated by Valmas Brothers?

A. They are all of Greek origin and citizenship.

Q. Of what citizenship are most of the unlicensed crew members of those vessels?

A. They could be Greek, but they could be foreign, as well, the lower members of the crew.

Q. Such men as seamen and oilers and messmen?

A. Greek, but if no Greeks are available, then, other nationalities.

Q. Are you obligated to hire Greeks if they are available?

A. Under Greek law, we have to have—seventy-five percent of the crew must be Greek.

Q. At the time the AGIOS NICOLAOS, that is, No. V, was on her first voyage to the United States, was she under a charter?

A. Yes, it was under charter.

Q. Do you recall who the charterer was?

A. I do not remember the name of the company. The agreement should have it.

Q. Let me suggest—

A. The charter party.

Q. Let me suggest, to refresh your recollection, that you look at these documents.

A. The charter party is Tradax International, S.A.

Q. Do you happen to know under the laws of what country Tradax, Incorporated—

THE INTERPRETER: Mr. Valmas does not remember. He is checking the agreement, again, to see. He does not know what the nationality is.

Q. (By Mr. Williams) Does Valmas Brothers, Ltd., or Valsky, or any of the three Valmas brothers have any financial interest whatsoever in Tradax?

A. No, they are totally unknown to each other. They do not know each other.

Q. This charter which I am going to ask the reporter to mark at this time, please, actually consists of several pages. This charter indicates that it was concluded in London. Is that correct?

(The instrument was marked "Valmas Deposition Exhibit No. 1" for identification by the reporter.)

A. Yes, it was concluded in London, but it was done through the means of a Greek broker.

Q. A Greek broker was representing you, is that correct, and Tradax had a company representing them?

A. Yes.

Q. And those two brokers, acting on behalf—one on behalf of the charterer and one on behalf of the owner actually concluded or fixed the charter in London?

A. Yes, they concluded this agreement in London.

Q. Do you keep any employees, of any sort, that is, employees of Valmas Brothers, Ltd., Valsky, or any employees, personally, of any of the shareholders of those two companies resident in the United States, for any purpose whatsoever?

A. No. Everybody lives in Greece. Everybody has their legal residence in Greece.

Q. Now, from time to time when your vessel goes into a foreign country, it becomes necessary for someone to arrange for a local agent to handle the business affairs of that ship at each of the ports she calls in?

A. These agents are usually designated, appointed by the charterers, but the owners can also appoint a protecting agent.

Q. And the function of the charterer's agent usually is to handle the routine business of entering the ship, seeing that the cargo gets to the ship, and that sort of thing.

A protecting agent is there to stand by in case something comes up that needs the owner's—or involves the owner's interest, as distinguished from the charterer's interest. Is that correct?

A. Yes.

Q. Now, on those occasions where you appoint a protecting agent at a foreign port, do you do it on the basis of that particular call of the vessel, or do you have someone that serves on a monthly or a yearly or a stated period of time?

A. A protecting agent is called in for any specific—for one specific situation that arises. It's not necessarily the same one. It is not always the same. The protecting agent is not always the same that covers it.

Q. When a protecting agent is appointed, is he appointed just for the time that the ship calls at that port?

A. The protecting agent is hired only for the period during which the ship is going to be in port.

Q. And when the ship finally sails from that port, his work is done?

A. He has nothing more to do when the ship sails.

Q. How do you normally appoint a protecting agent?

A. He is appointed either by letter of appointment or by a telex.

Q. Depending on how much time you have?

A. Yes, for the length of time that the ship is going to be in port.

Q. Does Valmas Brothers, Ltd., or Valsky own any property in the United States of America?

A. No, they do not own anything.

Q. Are the four vessels that you have told me about subject to mortgages?

A. Yes, there are mortgages on these vessels.

Q. Are those mortgages arranged with Euro dollars?

A. Yes.

Q. Does Valsky maintain a bank account of any sort in the Unted States of America?

A. No, no bank account. No bank account, except with the banks that we work with, do business with.

Q. All right. What banks in the United States do you do business with?

A. Irving Trust and with the Continental Bank which

also has an office here in Piraeus. It is not an American bank. It's English. It is an English bank.

THE INTERPRETER: The Continental Bank with which they do business here in Piraeus has its head office in London, Mr. Valmas thinks.

Q. (By Mr. Williams) But it is affiliated with the Continental Bank of Chicago?

THE INTERPRETER: He does not know. They have worked exclusively with the Continental Bank in Piraeus.

Q. (By Mr. Williams) And with respect to the Irving Bank, do you deal with that primarily in Piraeus or in London?

A. Through the Irving Trust we send money according to a difference in time—because of a difference in time, for sums that have to be paid.

Q. And all of these transactions have to do with the underlying Euro dollars mortgages?

A. Yes, all transactions are made with Euro dollars.

Q. And the transactions with the bank are only with respect to the mortgages?

A. Yes, and they have to do only with the mortgages on the ships.

Q. Now, have any of those banks ever had anything to do with the ownership or operation of any of your vessels other than simply having accepted a loan pledged by a mortgage on the vessel?

A. The relations with the bank are only for the loan and because they carry a mortgage on the vessels.

Q. But the question was: do the banks have anything to do with the actual operations of the vessels?

A. No.

Q. Did you know or did you have occasion to meet Mr. Kepessidis?

A. I met him personally because we had requested from an office of Chandris Lines, from the Department of Crews, and the director, the manager of that particular department, whose name is Mr. Vollikas, sent Mr.—

THE INTERPRETER: He was looking for work, and he came to Mr. Valmas, who met him, and Mr. Valmas sent him to the technical department where he met Mr. Vassilikos who was also the superintending engineer, who discussed with him and examined him and made sure that he was capable of—if he was capable of working for Valmas or not.

Q. (By Mr. Williams) That's the only contact you had with him?

A. That was the only contact I had.

THE INTERPRETER: In any case, Mr. Valmas' job is not this particular section. It's not something that he occupies himself with.

MR. WILLIAMS: I understand.

Q. (By Mr. Williams) Then, you called a friendly company and asked if they had someone that might serve as a chief engineer?

A. Yes. This is a very unusual thing; especially, as there is a lack of trade personnel, and all companies ask each other when they need somebody.

Q. And, so, they sent you this gentleman, you met

him, and turned him over to the supervising engineer, and that's, really, all you knew about the man?

A. Yes.

Q. Are you a technical man with engines, Mr. Valmas?

A. No. I am an economist.

Q. Now, I want to be sure that there is no question about the following questions—about your answers to the following questions.

Is any citizen of the United States employed in any capacity by Valmas Brothers, Ltd.?

A. Neither in Greece nor out of Greece, there is no one.

Q. Is any director of Valmas Brothers, Ltd., or Valsky, a citizen of the United States?

A. No. Everybody is Greek.

Q. Does Valmas Brothers operate ships through subsidiary corporations?

THE INTERPRETER: Mr. Valmas says that each ship is independently incorporated and is its own company, but they are all managed by Valmas and Valsky, and all the stocks of all the ships are owned by the same people, which are the three Valmas brothers.

Q. Now, is any of the owning companies of the other ships, that is, other than the AGIOS NICOLAOS V, the other three, is any of those companies incorporated under the laws of the United States of America?

A. No, none of them are incorporated in the United States.

MR. WILLIAMS: We pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. DUE:

Q. Mr. Valmas, who held the mortgage on the AGIOS NICOLAOS V?

A. Continental Bank.

Q. Do they still have the mortgage on that vessel?

A. They still have the mortgage.

Q. And they were the original mortgagee. Is that correct?

A. Yes, they were the original mortgagees.

Q. The AGIOS NICOLAOS V, is that the only asset of Valsky Maritime, Ltd.?

A. Yes.

Q. When was Valsky Maritime, Ltd., incorporated?

THE INTERPRETER: Whenever the ship was bought, and Mr. Valmas does not remember exactly. He cannot remember an exact date, but the incorporation took place at the same time as the buying of the ship.

Q. Did the charter with Tradax already exist in favor of the prior owner of the AGIOS NICOLAOS V, or was that charter brokered after Valsky bought the vessel?

A. The charter was brokered with this company after the purchase of the vessel. It had nothing to do with the previous owners of the vessel.

Q. Was not the charter executed on the same day as a memorandum of understanding between the seller and Valsky, as purchaser of the vessel?

THE INTERPRETER: This is a detail that Mr. Valmas does not remember because somebody else is in charge of the charter department.

Q. How did you come to know about the vessel being for sale? In other words, did you have a broker that put you and the seller of the vessel together, or how was that negotiated?

A. It was bought through brokers.

Q. Was that the same broker who brokered the charter or was it a different broker?

THE INTERPRETER: Mr. Valmas does not know. He knows that the vessel was bought through the brokers, Eurolines, Eurolines Laliotes, but whether they are the same people who negotiated the charter, he really does not know.

Q. Where is that company, the Eurolines?

A. It is based in Piraeus.

Q. Well, were they the agents or brokers for the Swedish company from whom Valsky purchased this vessel?

A. No. Those were different brokers.

Q. I have previously been furnished with a document entitled "Memorandum of Agreement," which I will mark Plaintiff Valmas 2, and pardon me. I have got a cold. I am having difficulty talking. But, anyway, I note—and, of course, the agreement speaks for itself—but the first part of the agreement—and I don't know. Can you read English? Well, the agreement, of course, is dated April 4, 1976, is it not?

A. Yes.

Q. And the agreement has a long name which is, obviously, the Swedish seller of the vessel?

A. Yes.

Q. And it says that that company of Sweden "hereinafter called the sellers have today sold," and, then, which

really doesn't have any place but, then, there is the name of Valsky Maritime, Ltd., Monrovia, Liberia.

A. These were the former owners.

Q. The Swedish company was?

A. Yes.

Q. And the seller to Valsky of the ship?

A. Yes, they are the sellers.

Q. And it shows that the ship is sold for a price of six million six hundred fifty thousand U.S. dollars. Is that right?

A. Yes.

Q. And it also shows that the ship is to be delivered at Cadiz, Spain, in about twenty-one days. Is that correct?

A. Yes.

Q. Now, with that information, would you not agree that the charter had already been negotiated at the time of the sale of the vessel or the purchase of the vessel to Valsky?

THE INTERPRETER: He says that, usually, when you are getting—in other words, if you are developing a business, you also try to get business for it. You cannot have a ship sitting around, waiting.

Q. Okay. Well, why were you to take delivery of the ship in Spain?

A. The ship was in dry dock in Spain on account of the sellers. They had it in dry dock in Spain, and it was getting a general checkup, or whatever they get.

(Disussion off the record.)

MR. DUE: Could we just state on the record at this time that Exhibit Defendant Valmas 1 shows that the

date of the charter was April 30, 1976, and that the date of the closing agreement on the sale was April the 4th, which was some, whatever, twenty-six days. And let the record further show that the only reason I was pursuing those questions: the copy of the time charter previously supplied to me by opposing counsel is, concededly, illegible with respect to the month. The only thing that appeared on it was the 30th day.

Q. (By Mr. Due) Have you ever been to the United States, Mr. Valmas?

A. Never.

Q. What about either of your brothers?

THE INTERPRETER: His brothers have gone. He thinks that both the elder and the younger have gone to the United States, visited the United States.

Q. What was the purpose of their going to the United States?

THE INTERPRETER: His elder brother had gone, and he thinks his sister-in-law was living in the United States. He had relatives in the United States. They were Greek who happened to be living in the United States, and he went there on a family visit. And he thinks the younger brother went as a tourist. He does not know.

Q. Who is the name of the relative in the United States? What is the name of the relative in the United States?

A. This was in 1950. Lemos. The name is Lemos. The sister of his brother's wife married somebody called Lemos. They were living—who was Greek. They were

both Greek. They were living in the United States at the time, and the brother-in-law went to visit them. And they are now living in Greece. They are no longer living in the United States.

Q. Okay. Do you know what if any changes were made to the vessel with respect to the auxiliary boilers?

A. Originally—to begin with, I'm not a technical person. I do not know what kind of technical matters carried out. That's only the technical department, but I just don't involve myself with that, at all.

THE INTERPRETER: He is aware of the fact that, certainly, repairs were made, but he does not know what.

Q. Are you not aware of the fact that when this vessel was originally manufactured, these auxiliary boilers were automatic with respect to the water in the boilers?

THE INTERPRETER: There are technical matters with which he has never been concerned and does not know. It's not matters that he deals with. He heard about them once in a while, but nothing—anything systematic, he does not know, but the technical department knows what is going on, is up to date.

Q. All right. What have you heard about that?

THE INTERPRETER: What he has heard is that an accident occurred and that two people died.

Q. Does Valmas do the maintenance of these vessels as well as operate the vessels?

A. Yes, both the maintenance and the operation.

Q. Who with Valmas would know what changes were made with respect to these boilers either from the way

they functioned when it was initially manufactured, or the way it functioned when it was owned by the Swedish company, compared with the way it functioned after it became the property of Valsky?

A. The technical department that dealt with the vessel.

Q. Who in the technical department?

A. Mr. Valsamakis and Mr. Vassilikos.

MR. DUE: Is either one of these gentlemen being produced?

MR. DeLANGE: Mr. Valsamakis is scheduled to testify.

Q. (By Mr. Due) Why do you create a separate corporation to own each ship?

A. So that each company will be responsible for the ship that it owns.

Q. Why do you use a Liberian corporation, such as for Valsky, instead of forming a Greek corporation?

A. The other companies are not Greek.

Q. I'm asking you why, when you create a corporation to own a ship, do you create, as you did in the case of Valsky, a Liberian corporation instead of using a Greek corporation to own the ship?

A. Because the Liberian company is more helpful.

Q. How is it more helpful?

A. It's more convenient.

Q. How is it more convenient?

A. It's easier in terms of movement.

THE INTERPRETER: All the companies that—not only their companies, but all companies that are outside Greece are either under Panamanian or Liberian.

Q. Do you not do that for tax reasons?

THE INTERPRETER: No, because they pay taxes in Greece. There is a tax that is affixed and which is paid. All ships that carry a Greek flag pay Greek tax.

Q. If Valsky Maritime, Ltd., were a Greek corporation instead of a Liberian corporation, would not you have to pay income tax to the Republic of Greece on income that would be earned by Valsky?

(Discussion off the record.)

(The preceding question was read by the reporter.)

A. (Continuing) I am going to repeat—

MR. WILLIAMS: Counsel, I hate to cut you off, but unless you can show me some relevance—you are not from the Greek IRS. I do not want to cut you off. If you can show me any possible relevance to this, and anything having to do with the status of the parties to the case, but in the absence of that, and in view of the time, I am going to instruct the witness that he does not need to answer that question.

MR. DUE: Well, you can do that.

MR. WILLIAMS: I want to give you the opportunity now to express to me any relevance you see to it.

MR. DUE: Well, really, I truly think that when you start dealing with these different entities—and a question obviously has been raised by the defense as to what law is applicable—I think, if somebody decides to incorporate

under the law of a particular country, we are entitled to know why. You got to take the good with the bad. I think I am entitled to pursue it. If you so instruct the witness and I, you know, decide to pursue it through seeking protective relief, et cetera, then, we will do that.

MR. WILLIAMS: We can go a little further with it, if it can be interpreted. I just think the relevance of it is awfully thin, but go ahead.

Greek shipping companies are not subject to income tax.

Q. (By Mr. Due) Okay. Why did you and your brothers create Valmas Brothers Shipping as a Panamanian corporation?

A. Because all shipping companies are registered under Panama law because it gives them the possibility to work more freely.

Q. What do you mean by that?

A. More easily; comfortably or easily.

Q. Why is that?

A. All shipping companies are Panama companies because they are afforded certain facilities, and that's why they are Panama companies.

Q. What facilities?

A. From the point of view of organization.

Q. Is that the only benefit that you obtain from Panamanian incorporation?

A. The Panama companies afford the possibility of moving and working more freely; and from that point of view, they are preferred.

Q. They are preferred by you?

A. By all shipping interests.

THE INTERPRETER: They are not the only ones.

Q. So, you do feel that definite benefits flow to you and your brothers by having a Liberian corporation, such as Valsky?

A. It's not absolute.

Q. What do you mean, "It's not absolute"?

THE INTERPRETER: The reason for the formations of these companies is that they have greater freedom of movement, but does not really know what other benefits to describe since, in any case, they pay taxes here in Greece.

Q. All right. Have you maintained Valsky as a legitimate Liberian corporation?

A. The company, Valsky Company, is registered in Liberia, but the ship, itself, is registered in Greece. The ship's registry is in Greece, and it flies a Greek flag.

Q. I know, but that didn't answer my question. Have you maintained Valsky Maritime, Ltd., as a legitimate corporation under the laws of Liberia?

A. Certainly.

Q. And have you, likewise, maintained Valmas Brothers Shipping as a legitimate Panamanian corporation?

A. Yes, certainly, it's a Panama company.

Q. The first voyage that the AGIOS NICOLAOS V took was to Beaumont, Texas, from Spain. Is that correct?

A. The first journey, yes.

Q. And the vessel sailed over to Beaumont empty, did it not?

A. It went from Cadiz to the States empty.

Q. And how much hire was earned by Valsky on the particular voyage?

A. How much what?
Q. Hire, h-i-r-e.

THE INTERPRETER: He does not remember. He says it's written in the agreement—in the charter.

Q. Was this one voyage made under this charter or was there more than one voyage?
THE INTERPRETER: He says these are details, and it's all included in the charter party; and if you need the information, it's all there.
Q. Well, the only thing I have is this particular time charter, and I'll ask you to look at that and answer that for me, then, if you would, please.
A. (Indicating.)
Q. By that you are referring to lines beginning thirteen through seventeen of the charter?
This was only one voyage in this charter. Is that correct?
A. Yes, only one voyage.
Q. Was this charter completed, this one voyage?

THE INTERPRETER: I beg your pardon?

Q. Was this charter completed, this one voyage?

THE INTERPRETER: I'm sorry. I don't understand. Does is mean that—what? Did they fulfill that charter?

Q. Was the charter completed or performed?
A. Yes, it was completed with this one voyage.
Q. Was the charter hire made in accordance with this charter? In other words, did Valsky receive the amount as set forth in the terms of this charter?

THE INTERPRETER: Yes, they did receive it.

Q. Okay. What voyages has the AGIOS NICOLAOS V made after this maiden voyage?

A. It worked with other companies, with other charterers, with a Belgian firm whose name I'm not sure how you spell.

THE INTERPRETER: But their charters come in constantly.

Q. Has this vessel ever called at the United States after this initial call in Beaumont?

A. Yes, it went, again.

Q. When did it go, again?

THE INTERPRETER: He does not remember when, but it would load coal and go. But he says there are agreements that can be found.

Q. How many times has this vessel gone to the United States?

MR. WILLIAMS: Excuse me, counsel. You mean, since the accident or including the accident voyage?

Q. (By Mr. Due) Including the accident. Or, let's say, how many times other than the accident?

A. I think, three times, including the maiden voyage.

Q. Where is this vessel now?

A. It's in Canada, and it's on its way to South Africa.

Q. When was it last in the United States?

A. About a month ago.

Q. About how many times has the MARIANA called in the United States?

THE INTERPRETER: He does not remember. He says, "I don't know where I would remember from, exactly." He doesn't know.

Q. Can you give me some reasonable approximation?
A. Three times, four times.

THE INTERPRETER: He doesn't remember.

A. (Continuing) It depends on the cargo. If it's wheat, they go, or grain. If it's wheat or grain, they go.
Q. When the AGIOS NICOLAOS V has been chartered, Valmas has been the employer of the crew. Is that correct?
A. Yes.
Q. How does Valmas make arrangements for supplying the vessel when it calls at a United States port?
A. There are various ship chandlers, offices, with whom the Valmas comes into contact, and they make arrangements for whatever necessary provisions are taken aboard.

THE INTERPRETER: He says there are many different companies.

Q. What happened to the AGIOS NICOLAOS V in Mobile, Alabama, after it left Beaumont?

THE INTERPRETER: He says there are things that he simply cannot remember and dates that he cannot keep in mind.

Q. Is it not true that there was another boiler explosion aboard the vessel in Mobile?

THE INTERPRETER: He says, "Yes, there were certain explosions," but he does not remember when or where, exactly.

Q. Who would know the technical information about that explosion?

A. The superintendents of the technical department.

Q. And the names are the same two?

A. Yes; Mr. Vollikas and Mr. Valsamakis, the names of the two gentlemen previously mentioned.

Q. Who made the arrangements for the ITT Ship Agencies, Inc., when the vessel sailed to Beaumont?

MR. WILLIAMS: Are you sure it's not TTT?

Q. (By Mr. Due) TTT, I'm sorry. . . . to make the arrangements to have the TTT Shipping Agencies, Inc., act on behalf of the vessel in Beaumont?

A. The operations department.

Q. Of Valmas?

A. Yes.

THE INTERPRETER: He says he doesn't know what TTT stands for.

Q. Who holds the mortgage on the MARIANA?

A. The Continental Bank.

Q. Who holds the mortgage on the vessel, RINOULA?

A. As security for a second mortgage, the Continental Bank has taken over these vessels, the RINOULA, the MARIANA. The Continental Bank has taken the MARIANA as security. The RINOULA and the MARIANA have been taken as a second mortgage as security for the loan made against the AGIOS NICOLAOS.

Q. Is there a first ship mortgage on either the MARIANA or the RINOULA?

THE INTERPRETER: He says these are economic matters, and he can't remember them.

Q. Well, who in Valmas would have that information?
A. His brother.
Q. Which brother?
A. Nicholas Valmas.
Q. You do not know whether there is more than one mortgage against the MARIANA?

THE INTERPRETER: He says it's one mortgage, but he doesn't remember because he is not in that department. His brother, Nicholas, is the one in charge of the mortgages.

Q. On which ship or ships does the Irving Trust hold a mortgage?
A. On the VALMAS.
Q. That's the only mortgage against that ship?
A. It's the only mortgage against this ship.
Q. Does any bank or lending institution other than Irving Trust and Continental Bank hold a mortgage against any of the ships which you have mentioned today in your deposition?
A. The RINOULA has been built here, and there is a loan against it from the Greek Bank of Economic Development—Industrial Development.
Q. Okay. What about the MARIANA? Where did that ship come from?
A. It's made in England and has been bought second-hand.

Q. Was it bought by the use of a mortgage from either Irving Trust or Continental?

A. No.

Q. Well, was it financed when it was purchased?

A. No.

Q. It was paid for in cash?

THE INTERPRETER: It was paid by them, and the National Bank gave a small loan, National Bank of Greece.

MR. WILLIAMS: When you said "them," that should be Valmas, I think. Just all I am talking about is the translation.

THE INTERPRETER: That's what I got, "them." Yes, the Valmas Company—Brothers.

Q. (By Mr. Due) Are you and your brothers personally responsible for any of the mortgages in favor of Irving Trust or Continental Bank?

THE INTERPRETER: Yes, they do have personal responsibility for the mortgages.

Q. Was Mr. Kepessidis hired on as the first chief engineer for the AGIOS NICOLAOS V once it was purchased by Valsky, or who was the first engineer?

A. On the journey from Spain to the States, the ship traveled with a Swede as chief engineer, who was already on board, the old chief engineer.

Q. Did Valmas pay his wages for that voyage?

A. Yes. He was given a lump sum.

Q. Okay. Then, it was not contemplated that Mr. Kepessidis would join the ship till after it arrived in Beaumont. Is that correct?

A. The ship traveled from Cadiz to Beaumont with the Swedish engineer.

THE INTERPRETER: They found Kepessidis because the Swedish engineer, the Swede, had agreed to make only one trip, and the ship would have remained without a chief engineer if Mr. Kepessidis had not been found.

Q. All right. When you hired your officers for that vessel, did you hire them for any particular period of time or for any minimum period of time or what?

A. The contract for the officers was for a year.

Q. Did that, likewise, include Mr. Kepessidis?

THE INTERPRETER: Yes, he says that the contract exists.

Q. But you recall the basis for the hiring of Mr. Kepessidis was to be for a minimum one year period, is that not correct?

A. Yes, especially, as Greek labor laws specify, one year as a minimum hiring period.

Q. At the time of the accident in Beaumont, who was the protection and indemnity club for Valsky, and who was the protection and indemnity club for Valmas?

THE INTERPRETER: He doesn't remember. These are details that he doesn't remember.

Q. Who in your organization would know those details?

A. Mr. Marinos, in the operations department. Mr.

Marinos in the operations department is also in charge of insurance.

Q. You have common people who do whatever work needs to be done for both Valmas and the different corporations which own the ships?

THE INTERPRETER: Have what personnel?

Q. Do you have persons in common, in other words, the same personnel?

A. The personnel is common to all the companies in the technical as well as in the operational departments.

Q. Are they all on the Valmas payroll?

A. Yes.

Q. You do not remember that the P & I club is West of England?

A. Yes, it is the West of England.

Q. All right. Thank you. That's all I have.

MR. WILLIAMS: Just a few questions.

REDIRECT EXAMINATION

QUESTIONS BY MR. WILLIAMS:

Q. Mr. Valmas, regardless of the country that the owning corporations organized in and regardless of the country that the operating company is organized in, if the vessel is registered in Greece, under the Greek flag, can she be sailed according to the Greek law?

MR. DUE: Object to the form of the question.

Q. (By Mr. Williams) Go ahead. Must she be sailed—

A. Yes, it's subject exclusively to Greek law.

Q. Regardless of the nationality of the owning company or the operating company, is that the case?

A. Yes. It has nothing to do with the nationality of the companies. Once it carries the Greek flag, it is entirely under Greek law.

Q. Now, has the Republic of Liberia ever complained about your failing to comply with its law insofar as Valsky is concerned?

A. No, there have never been any complaints.

Q. Has the government of the Republic of Panama ever complained to you about the way Valsky Brothers, Ltd., is being maintained—that corporation is being maintained?

A. The company in Panama is Valmas Brothers.

Q. That's what I asked.

A. No, there have never been any complaints.

Q. Now, you said that someone in the operations department would have appointed the agency, I think, when Mr. Due asked you a question but, then, you said that you didn't know what TTT stood for. Do you know, in fact, whether those agents were appointed by or on behalf of Valmas, or were they appointed by or on behalf of the charterers?

A. The agents, if it is a regular vessel's agent, they have been appointed by the charter company. If, however, it is the protecting agency, then, they are appointed by the owners.

Q. Yes. But, now, you were asked about TTT Shipping Agencies, Inc., in Beaumont. Do you know, and if you don't, just say you don't know, whether they were charterers' agents or owners' protecting agents?

THE INTERPRETER: No, he doesn't know.

MR. WILLIAMS: Fine. That's all.

RECROSS EXAMINATION

QUESTIONS BY MR. DUE:

Q. I'm sorry.

Under the charter, who paid for the fuel and for the food and supplies for the ship, would Valmas pay for that or would the charterer pay for that?

MR. DUE: I'm sorry. Let me ask him just one question.

A. (Continuing) If the ship is under a time charter, the charterers pay only for fuel. Everything else, food, lubricants, oil, and supplies for the ship are paid by the owners.

Q. (By Mr. Due) Now, I know this particular charter has been labeled "time charter," but was this—under this particular charter, since it was involving only the one voyage, who paid for food and everything besides fuel? Valmas?

THE INTERPRETER: He says that there is a special clause in this charter part where the charterers paid only for the fuel, and the owners paid for all other supplies because there would be one journey made. There could be only one journey under a time charter agreement.

MR. DUE: Okay. Thank you.

THE STATE OF TEXAS)

COUNTY OF HARRIS)

I, the undersigned notary public in and for Harris County, Texas, certify that the facts stated in the caption hereto are true; that at the time and place stated the witness named in the caption hereto personally appeared before me and, after being first carefully cautioned and sworn to tell the truth through the interpreter, was examined by counsel for the respective parties hereto; that the testimony of said witness was taken down in shorthand by me, later reduced to typewriting under my direction as a true and correct record of the testimony and, after being so reduced to typewriting, said deposition was returned to the District Clerk for filing herein pursuant to the terms of the stipulation of counsel under which said deposition was taken.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and, further, that I am not a relative or employee of any counsel employed by the parties hereto, or financially interested in the action.

I further certify that the charge for the completed original deposition is _____.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the ____ day of _____, 1976.

_____

Notary Public in and for
Harris County, Texas

My commission expires September 13, 1979.

9, EASTCHEAP, LONDON EC3P 3LX
Printed in U.S.A. and Sold by Unz & Co., Inc., 21 Beaver St., New York 10004

Time Charter

GOVERNMENT FORM

Approved by the New York Produce Exchange

November 6th, 1913—Amended October 20th, 1921; August 6th, 1931; October 3rd, 1946

TRADE (ENGLAND) 23/27 CAMOMILE ST. LONDON, E.C.3 LIMITED

This Charter Party, made and concluded in LONDON, 30th (thirtieth) day of April 19 76.

Between VALSAY MARITIME LTD, Liberia,

Owners of the good Greek Steamship / Motorship "ELISABETH FERISTRON" to be renamed "AGIOS NICOLAOS V" of

pf. 44742 tons gross register, and 29724 tons net register, having engines of indicated horse power

and with hull, machinery and equipment in a thoroughly efficient state, and classed +100 A1 in Lloyds Register

at of about 3,209,979 cubic feet grain capacity and about 75400 tons of 2240 lbs. in bale capacity

deadweight capacity (cargo and bunkers, including fresh water and stores not exceeding one and one half percent of ship's deadweight capacity, allowing a minimum of fifty tons) on a draft of feet inches on Summer freeboard, inclusive of permanent bunkers, which are of the capacity of about tons of fuel, and capable of steaming, fully laden, under good weather conditions about 15 knots on a consumption of about 62 tons of best Welsh coal—best grade fuel oil / best grade Diesel oil, now expected to be ready for delivery about the 3rd/5th May 1976, all going well

and TRADAX INTERNATIONAL S.A. Charterers of the City of Panama, R.P.

Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for about 6 trips via safe port or ports USA GULF/USA ATLANTIC/ST LAWRENCE RIVER and BLACK SEA,

within below mentioned trading limits.

Charterers to have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfilment of this Charter Party.

Vessel to be placed at the disposal of the Charterers, at on dropping the outbound Pilot on sailing from Cadiz,

~~In such berth or at such wharf or place (where she may safely lie always afloat at all times of tide, except as otherwise provided in clause No. 6), as the Charterers may direct. If any dock, wharf, quay or berth at which vessel is ordered cannot be reached on account of ice, vessel to be at the risk and expense of the Charterers as regards detention by ice, both ways, as well as for any damage to vessel caused by ice, unless such damage results from the negligence of the Master, Officers or crew.~~ Vessel on her delivery to be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service, having water ballast, winches and donkey boiler with sufficient steam power, or if not equipped with donkey boiler, then other power sufficient to run all the winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed, in carrying ~~lawful merchandise, including petroleum or its products, in proper containers, excluding~~ GRAINS and/or SEEDS and/or MEALS and/or PELLETS, in bulk.

~~(vessel is not to be employed in the carriage of Live Stock but Charterers are to have the privilege of shipping a small number on deck at their risk all necessary fittings and other requirements to be for account of Charterers), in such lawful trades, between safe port and/or ports in British North America and/or United States of America, and/or West Indies, and/or Central America, and/or Caribbean Sea, and/or Gulf of Mexico, and/or Mexico, and/or South America, and/or Europe and/or Africa, and/or Asia, and/or Australia, and/or Tasmania, and/or New Zealand, but excluding Magdalena River, River St. Lawrence between October 31st and May 15th, Hudson Bay and all unsafe ports; also excluding ice-bound ports, White Sea, Black Sea and the Baltic,~~

Within Institute Warranty Limits, excluding Cuba/Israel/Lebanon/Syria/Albania/Cyprus/Libya/Vietnam/N.Korea/Cambodia/China/

~~Taiwan and Iran, Iraq~~

.....

as the Charterers or their Agents shall direct, on the following conditions:

1. That the Owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, including boiler water and maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.

2. That the Charterers shall provide and pay for all the fuel except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the Owners. Fumigations ordered because of illness of the crew to be for Owners account. Fumigations ordered because of cargoes carried or ports visited while vessel is employed under this charter to be for Charterers account. All other fumigations to be for Charterers account after vessel has been on charter for a continuous period of six months or more.

~~Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo, but Owners to allow them the use of any dunnage and shifting boards already aboard vessel. Charterers to have the privilege of using shifting boards for dunnage, they making good any damage thereto.~~

3. ~~That the Charterers, at the port of delivery, and the Owners, at the port of re-delivery, shall take over and pay for all fuel remaining on board the vessel at the current prices in the respective ports, the vessel to be delivered with not less than ..... tons and not more than~~

..... ~~tons and to be re-delivered with not less than ..... tons and not more than ..... tons~~

4. That the Charterers shall pay for the use and hire of the said Vessel at the rate of $.2.00.(two dollars).....

.....United States Currency per ton on vessel's total deadweight carrying capacity, including bunkers and stores, on.....Lloyds.....summer freeboard, per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless lost) ~~at~~ off Japan.....20 days approximate and 10 days definite

.....unless otherwise mutually agreed. Charterers are to give Owners not less than.....days notice of vessel's expected date of re-delivery, and probable port.

5. Payment of said hire to be made in ~~New York~~ cash in United States Currency, ~~semi~~-monthly in advance, and for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. ~~Time to count from 7 a.m. on the working day following that on which written notice of readiness has been given to Charterers or their Agents before 4 p.m., but if required by Charterers, they to have the privilege of using vessel at once, such time used to count as hire.~~ Hire to be paid to Continental Bank, Piraeus Branch, for credit of Kalsky Maritime Ltd. Liberia

Cash for vessel's ordinary disbursements at any port may be advanced as required by the Captain, by the Charterers or their Agents, subject to 2½% commission and such advances shall be deducted from the hire. The Charterers, however, shall in no way be responsible for the application of such advances.

6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that Charterers or their Agents may direct, provided the vessel can safely lie always afloat at any time of tide, ~~except at such places where it is customary for similar size vessels to safely lie aground.~~

7. That the whole reach of the Vessel's Hold, Decks, and usual places of loading (not more than she can reasonably stow and carry), also accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel. ~~Charterers have the privilege of passengers as far as accommodations allow, Charterers paying Owners ..... per day per passenger for accommodations and meals. However, it is agreed that in case any fines or extra expenses are incurred in the maintenance of the carriage of passengers, Charterers are to bear such risk and expense.~~

8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

9. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

10. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the vessel and see that voyages are prosecuted with the utmost despatch. He is to be furnished with free accommodation, and same fare as provided for Captain's table, Charterers paying at the rate of ~~$.....~~ per day. Owners to victual Pilots and Customs Officers, and also, when authorized by Charterers or their Agents, to victual Tally Clerks, Stevedore's Foreman, etc., Charterers paying at the owners' cost per meal, for all such victualling, $ 3.75

11. That the Charterers shall furnish the Captain from time to time with all requisite instructions and sailing directions, in writing, and the Captain shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents, and furnish the Charterers, their Agents or Supercargo, when required, with a true copy of daily Logs, showing the course of the vessel and distance run and the consumption of fuel.

12. That the Captain shall use diligence in caring for the ventilation of the cargo.

13. ~~That the Charterers shall have the option of continuing this charter for a further period of~~ .....

which expected to be about 1250 tons of fuel oil and about 50 tons of diesel oil. Vessel to be redelivered with similar quantity on board, Charterers at delivery and Owners at redelivery to take over and pay for bunkers on board at the rate of $ 73.75 per long ton for the Fuel Oil and $ 126.45 per long ton for the Diesel Oil.

92 .....

93 ~~on giving written notice thereof to the Owners or their Agents ..... days previous to the expiration of the time covered from the said declared option.~~

94 14. That if required by Charterers, time not to commence before ...3rd May, 1976..... and should vessel

95 not have given written notice of readiness on or before ...8th May, 1976..... but not later than 4 p.m. Charterers or

96 their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness.

97 15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment,

98 grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause

99 preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by

100 defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence

101 thereof, and all extra expenses shall be deducted from the hire.

102 16. That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be

103 returned to the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas,

104 Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter Party, always mutually excepted.

105 The vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the

106 purpose of saving life and property.

Arbitration Clause

107 17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to ~~three persons~~ arbitration in accordance with attached amended Fearnresc

108 ~~one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for~~

109 ~~the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.~~

110 18. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Aver-

111 age contributions, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or excess

112 deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which

113 might have priority over the title and interest of the owners in the vessel.

114 19. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and

115 Crew's proportion. General Average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of

74 in London 116 ~~1974 Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these~~

117 Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into

118 United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at

119 the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or

120 bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier

121 or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if

122 required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the

123 carrier, be payable in United States money and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the

124 place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall be paid in

125 United States money.

126 In the event of accident, danger, damage or disaster, before or after commencement of the voyage resulting from any cause whatsoever,

127 whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the

128 goods, the shipper and the consignee, jointly and severally, shall contribute with the carrier in general average to the payment of any sacrifices,

129 losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the

130 goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or

131 ships belonged to strangers.

132 Provisions as to General Average in accordance with the above are to be included in all bills of lading issued hereunder.

133 20. Fuel used by the vessel while off hire, also for cooking, condensing water, or for grates and stoves to be agreed to as to quantity, and the

134 cost of replacing same, to be allowed by Owners.

135 21. ~~That as the vessel may be from time to time employed in tropical waters during the term of this Charter, Vessel is to be docked at a~~

136 ~~convenient place, bottom cleaned and painted whenever Charterers and Captain think necessary, at least once in every six months, recording from~~

137 ~~time of last painting, and payment of the hire to be suspended until she is again in proper state for the service.~~

138 ..... No dry-docking during the currency of this Charter Party except in case of emergency. .....

22. Owners shall maintain the gear of the ship as fitted, providing gear for all derricks capable of handling lifts up to three tons, also providing ropes, falls, slings and blocks. If vessel is fitted with derricks capable of handling heavier lifts Owners are to provide necessary gear for same, otherwise equipment and gear for heavier lifts shall be for Charterers' account. Owners also to provide on the vessel lanterns and oil for night work, and vessel to give use of electric light when so fitted, but any additional lights over those on board to be at Charterers' expense. The Charterers to have the use of any gear on board the vessel.

23. Vessel to work night and day, if required by Charterers, and all winches to be at Charterers' disposal during loading and discharging; steamer to provide one winchman per hatch to work winches day and night, as required, Charterers agreeing to pay officers, engineers, winchmen, deck hands and donkeymen for overtime work done in accordance with the working hours and rates stated in the ship's articles. If the crefuse of the part of the Owners, prevent crew from doing winches, then Charterers to be responsible for any loss of time occasioned thereby. Owners to pay for shore riggers, if required and pay any loss of time occasioned thereby. Clause No. 43

24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc.," in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clauses both of which are to be included in all bills of lading issued hereunder:

U. S. A. Clause Paramount

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

Both to Blame Collision Clause.

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier.

25. The vessel shall not be required to enter any ice-bound port, or any port where lights or light-ships have been or are about to be withdrawn by reason of ice, or where there is risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter the port or to get out after having completed loading or discharging.

26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account.

27. A commission of 2½ per cent is payable by the Vessel and Owners to Tradax International S.A., also 1¼% to Jackson, Stovell & Co.Ltd., London and 1¼% to Eurolines Shipping Ltd., of Piraeus.
on hire earned and paid under this Charter, and also upon any continuation or extension of this Charter.

28. An address commission of 2½ per cent payable to on the hire earned and paid under this Charter.

Clauses Nos 29 to 47 inclusive, as attached, are deemed to be incorporated in this Charter Party.

By cable authority from

The original Charter Party is in our possession.

BROKERS:

AND ON BEHALF OF
X INTERNACIONAL S.A. PANAMA
AND ON BEHALF OF TRADAX ENGLAND LIMITED
By Agents only

As ..... For Owners

By the authority of the Owners
VALSKY MARITIME LTD. LIBERIA.
For and on behalf of
VALMAS SHIPPING S.A.

Valmas
#1

APPENDIX 8

18th October, 1976.

TRADAX ENGLAND 33/37 CHISWELL ST. LONDON, E.C.1 LIMITED

J.A. STOVELL & CO. LTD. 9, EASTCHEAP, LONDON EC3M 1BH

Time Charter Party dated 30th April, 1976.

M.V. "AGIOS NICOLAOS V"

ADDENDUM No 1.

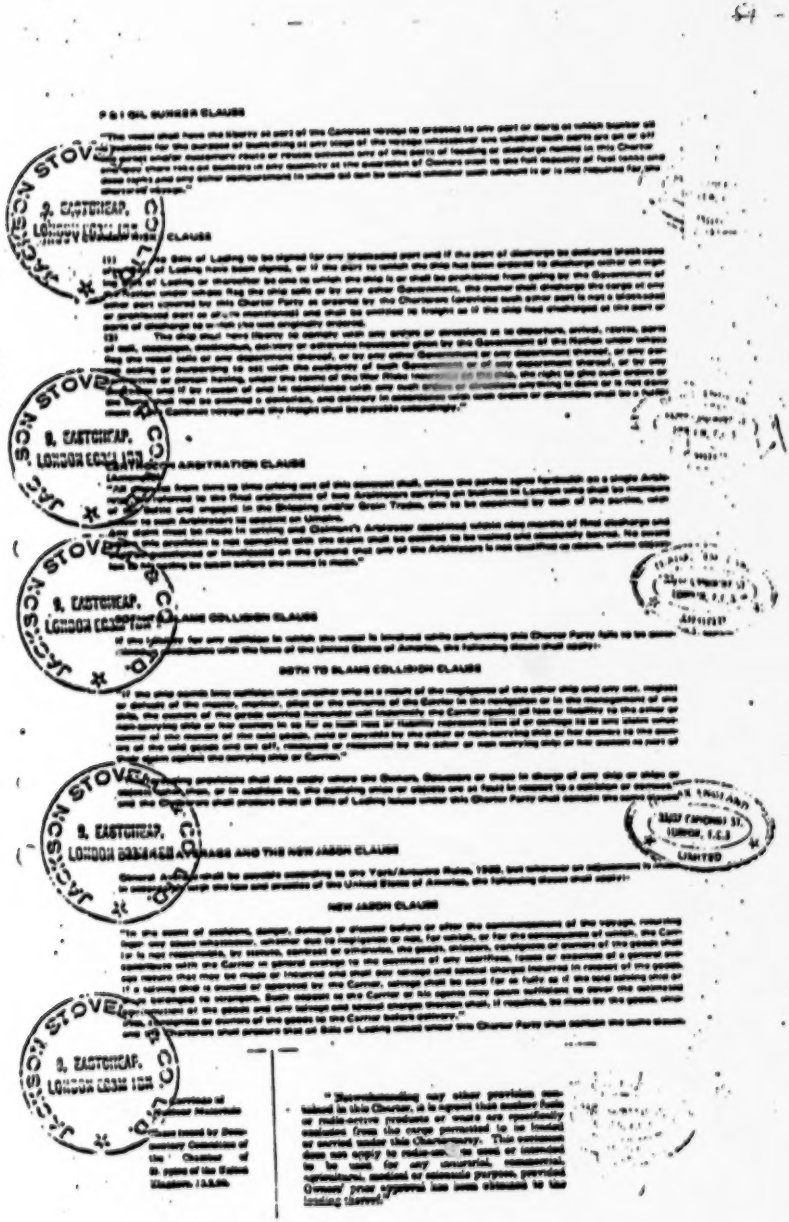
It is this day mutually agreed that after completion of discharge, vessel will proceed directly to PIRAEUS and will be re-delivered to Owners' on arrival at the Pilot Station at PIRAEUS with hire to be paid accordingly upto that time.

For the purpose of settling bunker accounts, Owners to pay for the quantity of bunkers that would have been remaining on board off Augusta as per Charter Party but it is understood Charterers will not bunker the vessel.

All other terms, conditions and exceptions of the Charter Party remaining unaltered.

FOR AND ON BEHALF OF
TRADAX EXPORT S.A., Panama Z.P.,
FOR AND ON BEHALF OF TRADAX, ENGLAND, LIMITED.
(As Agents only)

By the authority of the Owners
VALSKY MARITIME LTD.
For and on behalf of
VALMAS BROS. SHIPPING S.A.



P & I OIL BUNKER CLAUSE

"The owner shall have the liberty as part of the Contract Voyage to proceed to any port or ports at which bunker oil is obtainable for the purpose of bunkering at any stage of the voyage whatsoever and whether such ports are on or off the customary or direct navigation of the Contract Voyage and any of the ports of loading or discharge named in this Charter and any such ports may be used more than once and in any order and shall be deemed to be part of the Contract Voyage. The owner shall have the liberty to carry fuel for the purpose of bunkering at any such port notwithstanding that the same may be on board at the commencement of the Contract Voyage."

J. EASTCHEAP, LONDON EC3M 1EB

LIBERTY CLAUSE

(1) The Bills of Lading to be signed for any Shipowned port and if the port of discharge be destroyed before any of the Bills of Lading have been signed, or if the port to which the ship has been ordered to discharge either on account of blockade or of any other reason whatsoever be one to which the ship is or shall be prohibited from going by any Government or State (whether existing at the time this Charter is entered into or thereafter) under which the ship is registered or to which she belongs, or any other Government, the Owner shall discharge the cargo at any other port nominated by the Charterer within the limits prescribed by this Charter which the ship can reach and enter safely and lawfully. Any such discharge shall be deemed to be due performance of this Charter Party and the Owner shall be entitled to freight as if the ship had discharged at the port or ports of discharge originally intended, and shall be entitled to freight as if the ship had discharged at the port or ports of discharge so ordered and the Charterer shall pay any additional expenses thereby incurred.

(2) The ship shall have liberty to comply with any orders or recommendations as to departure, arrival, routes, ports of call, stoppages, destination, zones, waters or delivery which may be given to the Owner or the ship by any person who has the right to give such orders or recommendations by reason of the political or military authority of the Government under the flag of the ship or any Government to which the ship is otherwise subject, or any person acting or purporting to act with the authority of such Government or of any Government thereof, or any person who may be charged with the duty of enforcing the measures of any Government, or any person who has the right to give such orders or recommendations by reason of a mandatory power under the terms of the War Risks Insurance on the ship, the right to give such orders or recommendations to include any person or body acting with the power to compel compliance with their orders or instructions, and if by reason of and in compliance with any such orders or recommendations anything is done or is not done, the same shall not be deemed a deviation, and delivery or performance under such orders or recommendations shall be a fulfilment of the obligations of the Owner under this Charter Party. The Owner shall be entitled to insert in all Bills of Lading issued under this Charter Party such terms as may be necessary to give effect to the provisions of this clause.

J. EASTCHEAP, LONDON EC3M 1EB

LONDON ARBITRATION CLAUSE

Any dispute arising from time to time during and after the expiration of this agreement shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire.

Any award made in writing and Charterer's Arbitrator appointed within nine months of final discharge and any claim must be made in writing and Charterer's Arbitrator appointed within nine months of the date when such claim could have been made, otherwise the claim shall be waived and absolutely barred. No award made in pursuance of this agreement shall be enforceable in the United States of America until it has been confirmed by a Court having jurisdiction over the parties and the subject matter of the award.

The reference to arbitration and the award shall be governed by the laws relating to arbitration for the time being in force in England.

J. EASTCHEAP, LONDON EC3M 1EB

BOTH TO BLAME COLLISION CLAUSE

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said goods paid or payable by the other or non-carrying ship or her owners to the owners of any of the said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier."

The foregoing provisions shall also apply where the Owners, Operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.

J. EASTCHEAP, LONDON EC3M 1EB

GENERAL AVERAGE AND THE NEW JASON CLAUSE

General Average shall be payable according to the York/Antwerp Rules, 1950, but where according to the laws and practice of the United States of America, the following clause shall prevail:

NEW JASON CLAUSE

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Carrier or his agents may require shall be made by the goods, shippers, consignees or owners of the goods to the Carrier before delivery. Such deposit as the Carrier or his agents may require to be made by the goods, or some responsible person on their behalf, shall be made or guaranteed in cash before the goods are delivered. In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Carrier or his agents may require shall be made by the goods, shippers, consignees or owners of the goods to the Carrier before delivery. Such deposit as the Carrier or his agents may require to be made by the goods, or some responsible person on their behalf, shall be made or guaranteed in cash before the goods are delivered. In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Carrier or his agents may require shall be made by the goods, shippers, consignees or owners of the goods to the Carrier before delivery. Such deposit as the Carrier or his agents may require to be made by the goods, or some responsible person on their behalf, shall be made or guaranteed in cash before the goods are delivered. In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Carrier or his agents may require shall be made by the goods, shippers, consignees or owners of the goods to the Carrier before delivery. Such deposit as the Carrier or his agents may require to be made by the goods, or some responsible person on their behalf, shall be made or guaranteed in cash before the goods are delivered.

J. EASTCHEAP, LONDON EC3M 1EB

"Notwithstanding any other provision contained in this Charter, it is agreed that nuclear fuels or radio-active products or waste are specifically excluded from the cargo permitted to be loaded or carried under this Charter-party. The exclusion does not apply to radio-active material or isotopes to be used for any industrial, commercial, agricultural, medical or scientific purpose, provided Owners' prior approval has been obtained to the loading thereof."

9. Clauses attaching to and forming part of Charter Party dated 30th April 1976

M.V. "ELISABETH FERNSTROM" to be renamed "AGIOS NICOLAOS V"

29. Vessel to be clean for grain on arrival at loading port. If any space, at any time, is rejected by an official Grain Inspector, vessel to come off hire until re-passed.

30. Owners guarantee cargo lifting capacity voyage US Gulf to Black Sea 58500 long tons on a draft of 39' (thirty nine feet) fresh water.

31. First opening and last closing of hatches at each port to be performed by crew if permitted by local regulations otherwise same to be for Charterers account.

32. Charterers have the liberty to redeliver vessel unclean without dunnage if any being removed, against a lumpsum payment of $2000 (two thousand dollars USA currency).

33. Should the vessel put back whilst on voyage by reason of an accident or breakdown, or in the event of loss of time either in port or at sea or deviation upon the course of the voyage caused by sickness or accident to the crew or any person on board the vessel (other than supercargo employed by Charterers) or by any refusal of the Master or crew to perform their duties, the hire shall be suspended from the time of the inefficiency until vessel is again efficient in the same position and voyage resumed therefrom, and all expenses incurred including bunkers consumed during period of suspended hire, shall be for Owners' account.

34. It is understood that, if necessary, the vessel will comply with any safety regulations and/or requirements in effect at ports of loading and/or discharging. Although other provisions of this time charter make it the responsibility of the Owners, it is agreed that should the vessel not meet safety rules and regulations Owners will make immediate corrective measures and any stevedore standby time and other expenses involved, including off hire, will be for Owners account.

35. In no event shall Charterers procure or permit to be procured for the vessel any supplies necessaries or services without previously obtaining a statement signed by an authorised representative of the furnisher thereof, acknowledging that such supplies necessaries or services are being furnished on the credit of Charterers and not on the credit of the vessel or of her Owners and that the furnisher claims no maritime lien on the vessel therefore.

additional expenses required to place vessel in seaworthy trim between loading/discharging ports and/or berths including the cost of bagging to be for Charterers' account.

37. Charterers agree that their Agents will undertake without charges normal ships husbandry as Owners Agents. This shall not include any extraordinary business such as Crew member deserting or being left in hospital when Owner shall appoint their own Agents or pay the Charterers Agents an agency fee.

Expenses incurred by vessel by way of representation and cabling in connection with Charterers business to be for Charterers account.

38. If at any time during the currency of the Charter Party the vessel is requisitioned by any government, the balance of this time charter to be null and void.

39. Charterers' to have the benefit of any return of insurance premium received by Owners from Underwriters (as and when received from Underwriters) by reason of the vessel being in port for a minimum period of 30 days provided vessel is on hire.

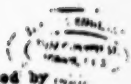
40. Any extra war risk premium on vessel or bonus to officers and crew in excess of vessel's present annual War Risk premium to be for Charterers account.

41. Referring to line 60 and 61 where this is any failure to make "punctual and regular payment" due to oversight, negligence, or error of Charterers, bankers or agents, Charterers shall be given by Owners three bank working days written notice to rectify the failure.

42. In the event of any of the following countries; Norway USA, Great Britain, France, West Germany, USSR, Peoples Republic of China, Japan becoming engaged as an actual participant in a war or warlike operation with one or more of the other named countries directly affecting due fulfillment of this contract, Charterers and/or Owners shall have the right to cancel this Charter Party without liability, such cancellation shall take place at the port of destination after discharge of any cargo on board, subject to the provisions of the attached Chamber of Shipping War Risks Clauses.

43. Charterers to pay a lumpsum of $2000 (two thousand dollars USA currency) per month or pro rata for part of a month in respect of Officers and crew overtime.

44. New Jason Clause, Both to Blame Collision Clause, Amended Centrocon Arbitration Clause, Chamber of Shipping War Risks Clauses Nos 1 and 2, P & I Bunkering Clause and Nuclear Fuel Clause as attached, are deemed fully incorporated within this Charter Party.



45. Charterers not to be responsible for any damages sustained by vessel in loading and discharging unless such damages are notified as soon as possible to Charterers representatives by the Master, and Master to hold responsible the respective parties as soon as possible after damage occurs.

46. Owners have the right after loading to take additional bunkers subject to deadweight permitting, all time and expense to be for Owners' account.

47. All other terms, conditions and exceptions of the Charter Party remaining unaltered.

Plaintiff Volume #2
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Memorandum of Agreement

Dated: Gothenburg, 4th April, 1976

Aktiebolaget A.K. Formstrine Granitindustrier, Karlshamn, Sweden,
hereinafter called the Sellers, have today sold, and
Valoky Maritime Ltd., Monrovia, Liberia,

hereinafter called the Buyers, have today bought the Swedish flag m.s. 'Elisabeth Formstrin'
Class: Lloyd's Register +100 A1
Built: 1968 by AB Götaverken, Gothenburg, Sweden
Register Tonnage: 44.742,30 GRT - 29.823,98 NRT
with everything belonging to her, as board and on shore, (see § 7), on the following conditions:

§ 1. Price: US $ 6.650.000.- (United States Dollars Six Million Six Hundred Fifty Thousand)

§ 2. As a security for the correct fulfilment of this contract, the Buyers shall pay a deposit of 20% — ten per cent — of the Purchase Money on signing this contract.
This amount shall be deposited with Skandinaviska Enskilda Banken, Malmö, Sweden,

and held by them in a joint account for the Sellers and the Buyers. Interest, if any, to be for Buyers' account. Any fee charged for holding said deposit, shall be borne equally by the Sellers and the Buyers.

§ 3. The said Purchase Money shall be paid in cash to Sellers' account with Skandinaviska Enskilda Banken, Malmö, Sweden,

on delivery of the vessel, but not later than 3 days (Sundays & Holidays excepted) after the vessel is ready for delivery and written notice hereof has been given to the Buyers by the Sellers.

§ 4. The Sellers shall provide the inspection of the vessel as to
The vessel and her class records have been inspected and approved by Buyers and thus the sale is outright.
and the Buyers shall undertake the inspection without undue delays to the vessel.

The vessel shall be delivered and taken over safe, afloat, Spain, about
21 days from the date hereof. Notice to give the vessel's
ETA/ETS from the last loading port.

Should the vessel become a total or constructive total loss before delivery, this contract shall be considered null and void and the deposit immediately released to the Buyers.

§ 5. The Buyers shall inspect the vessel without any opening up and test of the vessel. During the inspection the vessel's log books, documents and deck shall be made available for Buyers' examination. If the vessel is accepted after such inspection, the purchase shall become effective provided the Sellers have received written notice hereof within 48 hours after completion of such inspection.

Should the vessel be refused, this contract shall be considered null and void and the deposit immediately released to the buyers.

§ 6. For inspection of hollow and other underwater parts, the Sellers shall place the vessel in dry-dock at the port of delivery. If rudder, propeller, bottom or other underwater parts is found broken, damaged or defective, so as to affect the vessel's class certificate of class, same shall be made good at the Sellers' expense to Lloyd's Register's satisfaction without qualification as such underwater parts.

Whilst the vessel is in dry-dock, and if required by the Buyers or the representative of the Classification Society, the Sellers shall arrange to have the tail-end shaft drawn. Should same be so ordered or found defective so as to affect the vessel's class certificate of class, it shall be renewed or made good at Sellers' expense to the Classification Society's satisfaction without qualification as such underwater parts.

The expenses of drawing and replacing the tailend shaft shall be borne by the Buyers unless the Classification Society requires the tailend shaft to be drawn (whether same be renewed or not), renewed or made good, in which event the Sellers shall pay these expenses.

The expenses in connection with putting the vessel in and taking her out of

The expenses in connection with putting the vessel in and taking her out of drydock, including drydock dues and the Classification Surveyor's fees shall be paid by the Sellers if outside, propeller, bottom, other underwater parties or the tailshaft be found broken, damaged or defective as aforesaid or if the Classification Society requires the tailshaft to be drawn (whether damaged or not). In all other cases the Buyers shall pay the aforesaid expenses, dues and fees.

The Sellers shall at their own expense hang the vessel in the drydock and from the drydock to the place of delivery. See Clause No. 18.

§ 7. Unless otherwise agreed the Buyers shall take over the [as Sellers' contract] [hull] [&] [machinery] in [as] [is] [where] [afloat] [and on board] [on shore] [dock] [basis] [lying] at the port of delivery [in its present condition] [as per survey dated] [not to be surveyed] but otherwise in every respect, including spares [delete as applicable] [and] [or] [bunkers] [delete as applicable] belonging to the vessel at the time of inspection, used or unused whether on board or not shall become the Buyers' property. Forwarding charges, if any, shall be for the Buyers' account. The Sellers, however, are not required to replace spare parts including [delete as applicable] which have been taken out of spare and used as replacement prior to delivery.

The Sellers have the right to take ashore crockery, plate, cutlery, linen and other articles having the Sellers' flag or name, provided they substitute same with an adequate number of similar unmarked items for offshore and crew. Library, forms, etc., exclusively for use in Sellers' vessels, shall be excluded without compensation.

Payment under this clause shall be made in the same currency as the Purchase Money.

§ 8. In exchange for payment of the Purchase Money the Sellers shall furnish the Buyers with legal Bill of Sale of the said vessel free from all encumbrances and maritime liens, duly notarially attested and legalised by the Greek Consul [illegible] vessel's registry together with a certificate stating that the vessel is free from registered encumbrances. On delivery of the vessel the Sellers shall provide for the deletion of the vessel from the Ships' Register and deliver a certificate of deletion to the Buyers. The vessel shall be placed at the disposal of the Sellers to sail on the [illegible] of the Purchase Money, which shall be paid as agreed together with payment for items mentioned in § 7.

The Sellers shall, at the time of delivery, hand to the Buyers all classification certificates (for hull, engines, anchors, chains, etc.), as well as all plans which may be in Sellers' possession. [illegible]

§ 9. The Sellers guarantee that the vessel, at the time of delivery, is free from all encumbrances and maritime liens or any other debts whatsoever. Should any claims, which have been incurred prior to the time of delivery be made against the vessel, the Sellers hereby undertake to indemnify the Buyers against all consequences of such claims. Any taxes, notarial and/or consular and/or other charges and/or expenses connected with the purchase and registration under Buyers' flag, shall be for Buyers' account. Any taxes, notarial and or consular and/or other charges and/or expenses connected with closing of the Sellers' register, shall be for Sellers' account.

§ 10. The [illegible] vessel's National [illegible] to be included in the sale without any extra payment, [illegible] the property of the Sellers.

§ 11. The vessel with everything belonging to her shall be at Sellers' risk and expense until she is delivered to the Buyers, but subject to the conditions of this contract, the vessel with everything belonging to her shall be delivered and taken over as she is at the time of delivery, [illegible] which the Sellers shall have no responsibility [illegible] deficiencies of any description.

§ 12. The Sellers undertake to change the name of the vessel and allow [illegible] markings before taking the vessel under new Ownership.

§ 13. Should the Purchase Money not be paid as aforesaid, the Sellers have the [illegible] vessel, in which case the [illegible] to the Buyers. If the deposit does not cover the Sellers' loss, they shall be entitled to claim further compensation for any loss and for all expenses together with interest at the rate of 5% per annum.

[illegible]

§ 14. If default is made by the Sellers in the execution of a legal transfer or in delivery of the vessel with everything belonging to her at the manner and within the time herein specified, and the default shall have arisen from events for which the Sellers are responsible, the Buyers shall have the right to cancel this contract and the deposit as well as the [illegible] to the Buyers together with interest thereon at the

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Sellers are responsible, the Buyers shall have the right to cancel this contract and the deposit in full shall be returned to the Buyers together with interest thereon at the rate of 5% per annum. The Sellers shall, in addition, make due compensation for any loss caused to the Buyers by non-fulfilment of this contract.

§ 15. If any dispute should arise in connection with the interpretation and fulfilment of this contract, same shall be decided by arbitration in the city of London - English law to apply - and shall be referred to a single Arbitrator to be appointed by the parties hereto. If the parties cannot agree upon the appointment of the single Arbitrator, the dispute shall be settled by three Arbitrators, each party appointing one Arbitrator, the third being appointed by The Baltic and International Maritime Conference in Copenhagen. If either of the appointed Arbitrators refuses or is incapable of acting, the party who appointed him, shall appoint a new Arbitrator in his place.

If one party fails to appoint an Arbitrator — either originally or by way of substitution — for two weeks after the other party having appointed his Arbitrator, has sent the party making default notice by mail, cable or telex to make the appointment, The Baltic and International Maritime Conference shall, after application from the party having appointed his Arbitrator, also appoint an Arbitrator on behalf of the party making default.

The award rendered by the Arbitration Court shall be final and binding upon the parties and may if necessary be enforced by the Court or any other competent authority in the same manner as a judgment in the Court of Justice.

Clauses Nos. 16 - 23, as attached, are deemed to be incorporated in this Memorandum of Agreement.

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*) The name of the Classification Society to be inserted.

M.s. 'Elisabeth Fernström' - Additional Clauses to Memorandum of Agreement dated 4th April, 1976.

§ 16. The vessel to be delivered with present repairs completed and in substantially the same condition as when inspected, fair wear and tear accepted.

§ 17. The Buyers have the right to place upto three Officers on-board the vessel from the time contract signed and deposit lodged upto the time of delivery. Such Officers to be at Buyers' entire risk and expense and Letter of Indemnity to be signed before boarding.

Sellers will do their best in trying to arrange for one of their Engineers to stay onboard the vessel for some time after delivery at Buyers' expense. Wages and period to be negotiated directly with the Engineer in question.

§ 18. Vessel's scheduled drydocking at Cadiz between 6-9th April shall be considered as delivery drydocking as per Clause No. 6 of this contract, with Buyers' right to be present without interference.

During said drydocking Buyers have the right to paint bottom in direct arrangement with the yard.

When deposit lodged Buyers have the right to carry out any additional work they might require such as sandblasting, painting of deck and tank cleaning, but all such work to be at Buyers' time and expense and to be subject to Sellers' superintendent's agreement.

§ 19. Vessel to be delivered with hull special survey passed and with machinery continuous survey up to date and with class certificates free of recommendations and average damages affecting maintenance of class.

§ 20. All present class and international trading certificates and all navigational certificates as required for a Swedish flag ship to be valid for 3 months at time of delivery, except such certificates which must be returned to Swedish authorities.

§ 21. Following items are excluded from sale:

Works of Art - Godmother's gift - Master's, Officers' and crew's personal effects - Master's slop chest - Butterworth system - Log Books - Gas tubes - TV-TV Cassettesrecorder.

§ 22. The sale is subject to Swedish Export Licence.

§ 23. Buyers to supply Nationality Certificate of buying company at Sellers' request for purposes of deletion from Swedish Register also Buyers to sign Purchase Price Declaration on presentation by Sellers and Buyers to sign any other documents required by Swedish authorities.

Signed in duplo:

BUYERS:

SELLERS:

APPENDIX 9

AFFIDAVIT IN SUPPORT OF
MOTION TO DISMISS

I, Nicolaos A. Valmas, reside at 2, Efplias and Agiou Nicolaou Street, Piraeus - Greece. I am President of Valsky Maritime Ltd. and Valmas Bros. Shipping, S.A., owner and manager respectively of the M/V AGIOS NICOLAOS V. As President of the owner and managing companies, I am quite familiar with both companies' operations, stock ownership, the vessel, AGIOS NICOLAOS V, and how the companies conduct business. I make this Affidavit fully to disclose the nature and extent of the companies' operations to support a Motion to Dismiss suits filed in the United States District Court for the Eastern District of Texas, Beaumont Division, numbered Civil Action No. B-76-203-CA, Civil Action No. B-76-298-CA, Civil Action No. B-76-288-CA, Civil Action No. B-76-230-CA, under the Jones Act and General Maritime Law including the warranty of seaworthiness of the United States of America.

The M/V AGIOS NICOLAOS V is a Greek flag vessel owned by Valsky Maritime Ltd., Monrovia, Liberia, and operated by Valmas Bros. Shipping, S.A., having offices in Panama City, Republic of Panama and in Piraeus. The only vessel owned by Valsky Maritime Ltd. is the AGIOS NICOLAOS V. The crew of the M/V AGIOS NICOLAOS V was composed mostly of citizens of Greek nationality. Other nationalities represented were Cypriot and Egyptians. Also aboard was the Chief Steward's wife who is Greek, the Chief Mate's wife who is Portugese and a Greek Port Captain.

The AGIOS NICOLAOS V is a bulk carrier built in 1968 by a Swedish company. She was purchased by Valsky Maritime Ltd., Monrovia, Liberia, and delivered in Cadiz, Spain, in April of 1976.

On the occasion of the accidents made the basis of this suit, the vessel was on a single voyage which called for her to load grain in Beaumont, Texas, for delivery in the Soviet Union. This was her first voyage under her new owners, Valsky Maritime Ltd., Monrovia, Liberia.

All but three of the ship's crewmembers, joined the vessel in Cadiz, the three joining in Beaumont, Texas. All crewmembers signed contracts of employment in Piraeus, Greece. Said contracts of employment, of course, called for the application of Greek law and called for any disputes involving illness or personal injury claims to be resolved by the Courts of Greece, the country of the vessel's flag.

The AGIOS NICOLAOS V is managed by Valmas Bros. Shipping, S.A., a Panamanian corporation having offices in Panama City, Republic of Panama, as well as in Piraeus, Greece. All of the stock of Valsky Maritime Ltd., Monrovia, Liberia, and Valmas Bros. Shipping, S.A., is held by persons who are both residents and citizens of Greece. The officers and directors of the company are as follows:

Nicolaos A. Valmas, President - Greek citizen
2, Efplias and Agiou Nicolaou Str.,
Piraeus - Greece

Christoforos A. Valmas, Vice President - Greek citizen
2, Efplias and Agiou Nicolaou Str.,
Piraeus - Greece

Dimitri A. Valmas, Secretary - Greek citizen
2, Efplias and Agiou Nicolaou Str.,
Piraeus - Greece

Neither Valsky Maritime Ltd., Monrovia, Liberia, nor Valmas Bros. Shipping, S.A., has an office in the United States. The only agents used in the United States are husbanding agents as any vessel would employ on its calls to a foreign port. There are no parent or subsidiary companies of Valsky Maritime Ltd. or Valmas Bros. Shipping, S.A.

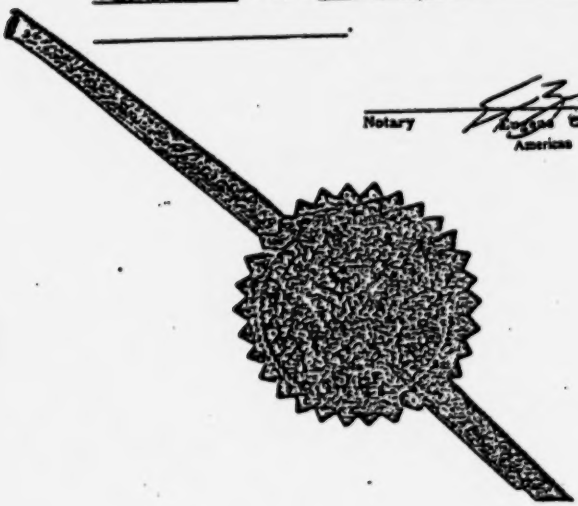
Nicolaos A. Valmas, President

Witness

Witness

EMBASSY OF THE)
UNITED STATES OF AMERICA)

SWORN TO AND SUBSCRIBED BEFORE ME, this 2nd day of December, 1976, at Athens, Greece.



Notary

Leonard C. Zajac
American Consul

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No. 80-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALMAS BROTHERS SHIPPING, S.A. and
VALSKY MARITIME, LTD.,
Petitioner,

versus

JACK FISHER, ETC. and
EUGENIA KEPESSIDIS, Individually, Etc.,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether findings of fact by a District Court that two foreign corporations' substantial source of revenue was derived from United States grain transportation, that said corporations maintained a substantial base of operations in the United States of America, and that the respondents' decedent was specifically hired and transported to the United States to work on said corporations' vessel in the United States, are such facts to justify application of United States law to said foreign corporations pursuant to the teachings of *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, Reh. Den., 400 U.S. 856 (1970).

II. Whether findings of fact by a District Court that two foreign corporations maintained a substantial base of operations in the United States of America, and derived substantial revenue from United States trade, freight and charger hire, such that United States substantive law is to govern a controversy pursuant to *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 Reh. Den., 400 U.S. 856 (1970) can be defeated by an adhesion contract with respondents' decedent specifying the application of the law of a foreign country to any controversy between the employer and his seaman employees.

III. Whether findings of fact by a District Court that two foreign corporations had a substantial base of operations in the United States of America and derived substantial revenue from United States trade, freight and charter hire, such that the law of the United States is to apply to a controversy pursuant to *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, Reh. Den., 400 U.S. 856 (1970), presents any new policy considerations for review by this Court.

IV. Whether the decision below is in conflict with the decisions of this Court.

V. Whether the decision below is in conflict with the decisions of the Fifth Circuit Court of Appeals.

VI. Whether the decision below is in conflict with the decisions of other Courts of Appeals.

VII. Whether the peculiar facts of this case, given that the substantive law of the United States would have been applied in any event pursuant to either Greek or Liberian law, are such that make this matter an appropriate vehicle for this Court's review of the issues presented.

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No.80-1810

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

VALMAS BROTHERS SHIPPING, S.A. and
VALSKY MARITIME, LTD.,
Petitioners,

versus

JACK FISHER, ETC. and
EUGENIA KEPESSIDIS, Individually, Etc.,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jack Fisher and Eugenia Kepessidis, the respondents herein, pray that the Petition for Writ of Certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 10, 1980, be denied. The United States Court of Appeals for the Fifth Circuit denied petitioners' Petition for Rehearing En Banc on January 28, 1981.

OPINIONS BELOW

The October 10, 1980, opinion of the Court of Appeals, whose judgment is sought to be reviewed, is reported at 628 F.2d 308, and is reprinted in the separate Appendix accompanying the Petition (Appendix, p. 1). The January 28, 1981, order of the Court of Appeals denying petitioners' Petition for Rehearing En Banc is reported at 636 F.2d 1107, and is reprinted in the separate Appendix filed with the Petition (Appendix, p. 27). The prior decrees and orders of the United States District Court for the Eastern District of Texas (of November 28, 1977; October 11, 1978; and December 6, 1978) are unreported. They are set forth in the separate Appendix filed with the Petition (Appendix, pp. 48, 53 and 72, respectively).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 10, 1980. A Petition for Rehearing En Banc was denied on Janu-

ary 28, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

46 U.S.C. §688, commonly referred to as the "Jones Act", is reproduced verbatim in the Petition (Petition, pp. 2-3).

STATEMENT OF THE CASE

For convenience and ease of identification, the defendants in the District Court will be referred to herein as petitioners. Plaintiffs in the District Court, Jack Fisher and Eugenia Kepessidis, will be referred to herein as respondents.

Petitioners seek certiorari to review a decision and opinion of the United States Court of Appeals, Fifth Circuit, which upheld findings of fact made by the District Court that petitioners maintained a substantial base of operations in the United States and additionally derived substantial revenue from United States trade, freight and charter hire, so as to warrant application of United States substantive law, 46 U.S.C. §688, to a controversy involving the death of one of their seaman employees who was killed aboard their only vessel in Beaumont, Texas, on June 1, 1976.

Petitioner, Valsky Maritime, Ltd., is a Liberian corporation whose only asset was the M/V AGIOS NICOLAOS V, the vessel involved in the death sued upon. The ship was operated at the time of the accident by Valmas Brothers Shipping, S.A., a Panamanian cor-

poration. Both corporations are legitimate corporations in the countries of their respective domiciles [Appendix, p. 105). The vessel in question had never been to Greece, Liberia or Panama, prior to the accident. After its purchase by petitioner, Valsky Maritime, Ltd., from a Swedish Company, the vessel made a transatlantic voyage from its port of delivery in Cadiz, Spain, to Beaumont, Texas, *empty*, simply to conduct its business with grain interests in the area and prepare the ship to be put into service.

Respondents' decedent, Dimitrios Kepessidis, was specifically hired to join the vessel in the Port of Beaumont, Texas, and take charge of sea readiness operations of the vessel as Chief Engineer. He was transported at his employer's expense to Beaumont, Texas, and joined the vessel on May 22, 1976. The entire tenure of the decedent's service aboard the vessel was in Beaumont, Texas, and it was not until June 1, 1976, that the decedent was killed while attempting to service a boiler on the vessel.

The action in the District Court was initiated by complaint filed *in personam* and *in rem* on behalf of the survivors of Dimitrios Kepessidis. The vessel was seized in the Eastern District of Texas in August, 1976, and a letter of undertaking was posted for security. Preliminary motions to dismiss on the basis of *forum non conveniens* were filed by petitioners and denied by the Trial Court judge in written reasons on November 28, 1977. Trial depositions were taken in this matter by all

parties, some necessitating a trip to Greece, and the case proceeded to trial on December 7, 8 and 12, 1977. Thereafter, judgment was rendered in favor of respondents on December 6, 1978. The judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit on October 10, 1980, and on January 28, 1980, a request for Rehearing En Banc was denied.

ARGUMENT

I.

Certiorari Should Be Denied In This Case Because Findings Of Fact By The Trial Court With Affirmation By The Fifth Circuit That The Two Foreign Corporations Maintained A Substantial Base Of Operations In The United States And Derived Substantial Revenue From United States Trade Are Such Findings So As To Justify Application Of United States Law To This Controversy.

The decision in the Court below is in direct conformity with the decision of this Court in the Case of *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, Reh. Den., 400 U.S. 856 (1970). In *Hellenic Lines, Ltd., supra*, this Court held that a shipowner's base of operations is a "factor of importance in determining whether the Jones Act is applicable; and there well may be others".[1] The Trial Court below, after "an analysis of all relevant factors", specifically found that "[t]he defendants have a sub-

1 398 U.S. 309.

stantial base of operations in the United States and derive substantial revenue from United States trade, freight and charter hire". [Appendix to the Petition, pp. 68-69]. After a second full review of all of the relevant facts underlying this controversy, the Court of Appeals below found no reversible error in the factual findings by the Trial Court that the vessel in question had a substantial United States base of operations and derived substantial revenues from United States trade. The Court of Appeals below found that, from its analysis of the facts, the Trial Court could have reasonably found that the vessel involved in this accident had been specifically purchased for the purpose of servicing United States grain trade.[2] Thus, both the factual findings by the Trial Court and the analysis of those findings by the Court of Appeals below clearly placed this case within the rule of *Hellenic Lines, Ltd., supra,* in the application of United States law to foreign shippers maintaining a substantial base of operations in the United States. Neither the Trial Court nor the Court of Appeals below espoused any novel test for the application of United States law, and in fact used *Hellenic Lines, Ltd., supra,* specifically as the guide in deciding this controversy.

Although petitioners argue that this case is in conflict with the decisions of this Court, and specifically *Hellenic Lines, Ltd., supra,* and *Lauritzen v. Larsen,* 345 U.S. 571 (1953), as the Court of Appeals below noted the real dispute petitioners have in this case involves a dis-

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2 628 F.2d 318.

agreement with the facts found by the Trial Court. The Court of Appeals below noted:

> The district court's determination that a shipowner has or has not a substantial base of operations in the United States is a factual finding that should not be disturbed on review unless clearly erroneous. *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 318, 315 (4th Cir., 1978). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *Dresser Industries v. Fidelity & Cas. Co. of N.Y.*, 580 F.2d 806, 807 (5th Cir., 1978).[3]

The evidence adduced at trial clearly justified a finding by the Trial Court supportive of the application of United States law. Although petitioners classify the AGIOS NICOLAOS V, as one of the group of so called tramp vessels, "ones who take their cargo from and to ports anywhere in the world as they are directed to do by those who charter the vessel" [Petition p. 9, note 3], in fact the evidence adduced at trial showed that immediately after purchase of the vessel and preliminary steps to make it seaworthy, the vessel was transported

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3 628 F.2d 318. The specific holding of the Court of Appeals below was that there was no reversible error found in the factual findings by the Trial Court.

empty on an expensive transatlantic voyage from Cadiz, Spain, to Beaumont, Texas, to begin its business operations. Thereafter, the decedent was specifically hired and transported to Beaumont, Texas, to work on the vessel and prepare it for sea in that port. The vessel did not immediately take on cargo in Beaumont, Texas, with an eye toward immediate transportation, but engaged in operational and business activities in that port for what would have been an extended period of time for a so called tramp vessel. Representatives of petitioners admitted in deposition that they hired the customary agents to look after the cargo operations, but also engaged special agents to look after the shipowner's interests.

Arguing with the factual findings by the Trial Court, petitioners reinterpret this evidence and rather cavalierly state that all of the evidence and facts presented at trial simply add up to the conclusion that the only contact petitioners had with United States in this matter was the "place of injury". Petitioners point to the list of factors discussed by this Court in *Lauritzen, supra,* and argue that respondents quantitatively failed to meet the test for application of United States law. However, just such a quantitative analysis of choice of law contacts has been rejected by this Court in *Hellenic Lines, Ltd., supra.* This Court in *Hellenic Lines, Ltd., supra,* held that rather than quantitatively assessing the *Lauritzen* factors the proper test is a qualitative one con-

sidering all of the evidence, and this is most particularly important with regard to the base of operations contact. As the Court of Appeals below noted, had this Court intended a mechanical application of *Lauritzen, supra,* the plaintiff in *Hellenic Lines, Ltd., supra,* would not have prevailed. Notwithstanding this context, petitioners rhetorically state the vessel in this case made only one trip to the United States before the accident. While the fact that the voyage to Beaumont, Texas, in this case, was the maiden voyage of the vessel is irrelevant for purposes of a quantitative analysis that petitioners favor, the fact that said voyage took place in the manner in which it did with the concommitant United States contacts was very significant in the mind of the Trial Court in analyzing the facts of this case and the projection of pattern for conduct on the part of the employers of the decedent.

The case at bar is the result of a detailed finding of facts by the Trial Court below after a full trial on the merits, specifically utilizing *Hellenic Lines, Ltd., supra,* as its guide in the choice of law question. Recognizing that the finding of facts by the Trial Court ought not be disturbed absent clear error, the Court of Appeals below again analyzed the record and found no reversible error. Now, petitioners take their factual dispute before this Court for yet a third review. Certiorari ought be denied.

II.

Certiorari Should Be Denied In This Case Because A Seaman's Employment Contract Not Negotiated At Arm's Length Cannot By Its Terms Defeat The Otherwise Proper Application Of United States Law To A Controversy And Divest A United States District Court Of Otherwise Proper Jurisdiction.

As did the plaintiff seaman in *Hellenic Lines, Ltd., supra,* the decedent in the case at bar was a signatory to an employment contract at the time of his death which would conventionally apply the laws of the Republic of Greece and the forum of a Greek Court to any controversy involving the seaman and his employer. As this Court in *Hellenic Lines, Ltd., supra,* implicitly held, such a contract can in no way impair the application of United States law to a controversy pursuant to a factual finding that would otherwise apply United States law to said controversy. The Court of Appeals below, again following *Hellenic Lines, Ltd., supra,* dismissed this argument urged now by petitioners.[4] The significance *vel non* of such an employment contract has also been discussed from time to time in the lower courts. *See e.g., Blanco v. Phoenix Compania de Navegacion, S.A.*, 304 F.2d 13 (4th Cir. 1962) and *Retzekas v. Vygla S.S. Co.*, 193 F.Supp. 259 (D. R.I. 1961).

Specific facts of this case make such an employment contract additionally irrelevant. Although the con-

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4 628 F.2d 316, note 13.

tract provides for adjudication in a Greek forum, neither petitioners are Greek corporations. At the trial of this matter, expert testimony revealed that although respondents would have theoretically had a cause of action which could have been urged in the courts of Greece, a Greek forum is not accessible to this controversy because under Greek law the domicile of the corporation (not that of the stockholders) determines personal jurisdiction, and an agreement between parties to confer jurisdiction on Greek Courts is not enforceable in Greece.[5]

III.

Certiorari Should Be Denied In This Case Because There Are No Valid Policy Reasons Existing To The End That The Law Of The United States Ought Not Be Applied To A Liberian And Panamanian Corporation Maintaining A Substantial Base Of Operations In The United States And Deriving Substantial Revenue From United States Trade On The Basis Of Greek Law.

The policy considerations underlying the issues presented in the case at bar were very clearly stated by this Court in the case of *Hellenic Lines, Ltd., supra:*

> We see no reason whatsoever to give the Jones Act a strained construction so that this alien

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5 This matter was discussed in the Court of Appeals below. *See*, 628 F.2d 317, notes 14 & 15.

> owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act "employer". The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with his country. If, as stated in *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and its owner have with the United States.[6]

Petitioners argue that the Trial Court and the Court of Appeals below imposed United States law on petitioners simply because the place of injury was in the United States and, as prophets of doom, petitioners foresee the floodgates of litigation now open with no substantive principles to guide the lower courts, but neither assertion is on point with this case. The Court of Appeals below specifically stated that the place of wrongful act alone is an insufficient factor upon which

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6 398 U.S. 310.

to base the retention of United States jurisdiction.[7] The substantive principles relied on by the Trial Court and the Court of Appeals below came from this Court's decision in *Hellenic Lines, Ltd., supra.* The so called floodgates through which petitioners have found themselves cast in judgment are open no wider now than they were a decade ago, and certiorari ought be denied in this case.

IV.

Certiorari Should Be Denied In This Case Because The Decision In The Court Below Does Not Conflict With The Decisions Of This Court.

As is clear from the record in this case, both the Trial Court and the Court of Appeals below adopted as their guideline this Court's decision in *Hellenic Lines, Ltd., supra,* in the historical context of both *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959) and *Lauritzen, supra.* Although this Court in *Hellenic Lines, Ltd., supra,* has suggested that other factors than those outlined in this historical trilogy could serve as the basis for application of United States law in this context[8], the Courts below adopted no new principles in the application of law problem, neither yet were any new expansive interpretations of the case law espoused. The Trial

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7 628 F.2d 713, note 17.

8 398 U.S. 309.

Court and Court of Appeals below utilized the decisions of this Court as they must be utilized, as guides in applying the facts of a specific case.

In exhausting detail, petitioners compare their interpretation of the facts in the case at bar with those facts presented in *Lauritzen, supra,* and *Hellenic Lines, Ltd., supra,* to the end that petitioners argue that the Courts below erred in applying United States law to this case because the exact fact circumstances of *Lauritzen, supra,* and *Hellenic Lines, Ltd., supra,* can be distinguished from those in the case at bar, but in so arguing petitioners fail to recognize that in rendering these decisions this Court was setting forth guidelines for the lower courts to follow in making their own factual analyses in choice of law questions rather than setting forth an exclusive list of fact circumstances pursuant to which the lower courts would have to find parallels in order to apply United States law. The facts of every case will differ, and as aforementioned the facts of *Hellenic Lines, Ltd., supra,* so drastically differed from those presented in *Lauritzen, supra,* that the former case would have failed to meet the analytical burden of the latter case if a quantitative approach had been taken. Simply because petitioners contest the findings of fact below that they maintained a substantial base of operations in the United States and derived substantial revenue from United States trade is not a valid reason for the granting of certiorari herein.

V.

Certiorari Should Be Denied In This Case Because The Decision In The Court Below Does Not Conflict With The Decisions Of The Fifth Circuit.

Although petitioners would have it otherwise, a settled and consistent rule of the Fifth Circuit, of which the case below exemplifies, is that a finding by a District Court that a shipowner has or has not a substantial base of operations in the United States and does or does not derive substantial economic benefit from operations in the United States is a factual finding which ought be made by the Trial Court in light of all of the evidence, and will not be disturbed on appeal absent a finding that the Trial Court was "clearly erroneous". Far from conflicting, the Fifth Circuit cases cited by petitioners are consistent examples of this logical appellate attitude toward factual findings in this area.

The case of *Merren v. A/S BORGESTED*, 519 F.2d 82 (5th Cir. 1975), was a case which presented absolutely no evidence of a United States base of operations for the Norwegian defendant, nor a substantial source of revenue for the shipowner with regard to United States trade. The Court of Appeals noted that the only point of contact in the entire controversy with the United States was in the mere fact that an employment contract had been signed in a United States port, and the Court quite properly rejected any jurisdictional claim made by plaintiff. Likewise, the case of *Avila v. M/V TOLUCA*, reported at 636 F.2d 1107, 1112 (5th Cir. 1980), demonstrates no inconsistency supportive

of petitioners' argument. Although the case was simply a Per Curiam affirmation of a District Court's order adopting a recommendation of a United States Magistrate, the opinion is supportive of the Fifth Circuit philosophy in this matter. While noting that evidence of substantial income being derived from cargo either terminating or originating in the United States is indicative of a base of operations finding, the opinion notes, as does the opinion of the Court of Appeals below in the case at bar, that a mere fortuitous situs of accident in the United States (here, in the state of Maryland) is no case for application of United States law. The court specifically noted that this was not a flag of convenience case.[9]

Likewise, petitioners should find little support in the case of *Nunez-Lozano v. Rederi*, 634 F.2d 135 (5th Cir. 1980), which case cited as support the case below, *Fisher v. AGIOS NICOLAOS V*, 628 F.2d 308 (5th Cir. 1980). In *Nunez-Lozano, supra*, while citing the findings of fact by the trial judge and noting no reversible error, the Fifth Circuit noted that the only contact with the United States was the mere fact that the seaman in question signed a contract in the United States. The Fifth Circuit affirmed dismissal on *forum non conveniens* grounds. The short Per Curiam opinion in *Tamboris v. Kainis Compania Maritima, S.A.*, 430 F.2d 1131 (5th Cir. 1971), did

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9 636 F.2d 1112.

not discuss in detail the base of operations approach to the choice of law question, and the Fifth Circuit apparently did not re-analyze the facts found by the District Court, but the Court did note the District Court's evaluation of the case under *Lauritzen, supra* and *Hellenic Lines, Ltd., supra,* principles.

Although petitioners cavalierly charge the Fifth Circuit with "blatant disregard of their judicial obligations"[10] of late in reviewing the decisions of the various trial courts on choice of law questions, it does not, as petitioners suggest, take the "wildest imagination"[11] to either distinguish each of the foregoing cases from each other and the case at bar, or to see with absolute clarity that the Fifth Circuit has consistently reviewed each appeal in this area on a case by case basis and has not cast away the factual findings by the Trial Court absent clear error.

VI.

Certiorari Should Be Denied In This Case Because The Decision In The Court Below Does Not Conflict With The Decisions Of Other Courts Of Appeals.

Arguing that numerical "calls" in American ports is in some way significant with regard to the case below,

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10 Petition, p. 13.

11 Petition, p. 12.

petitioners cite five cases from other Courts of Appeals which, with one exception, involve a denial of the application of United States law to a controversy in the context of a fact situation involving numerous calls of the respective vessels to United States ports, but either on this basis or the basis of other criteria the cases cited are either obviously distinguishable or consistent with the decision below.

In *Koutoris v. Konkar Intrepid Corp.*, 535 F.2d 1392 (2nd Cir. 1976), the Second Circuit Court of Appeals affirmed a dismissal at the Trial Court level of a foreign plaintiffs' suit, finding that (other than minimal bank dealings) the only United States contact in the case was a place of injury in the state of Maryland. The Court specifically noted no evidence supportive of a base of operations factual finding nor did the Court or Trial Court find substantial revenues were being derived by the defendant from United States trade. Significantly, the Court rejected a mechanical analysis of *Lauritzen, supra,* and noted with approval the Trial Court's discretion in these matters.

In *De Mateos v. Texaco, Inc.*, 562 F.2d 895 (3rd Cir. 1977), the Court of Appeals for the Third Circuit found no evidence whatsoever that the vessel in question ever earned income from voyages to the United States, and found the defendant Panamanian corporation was engaged exclusively in transportation of petroleum products between Central American countries. Plain-

tiff's decedent was a Panamanian seaman injured on a voyage between Honduras and Costa Rica and had never been to the United States aboard one of the defendant's vessels. The Court found the base of operations factor completely inapplicable to the analysis of the case.

In *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240 (3rd Cir. 1980) four Venezuelan workers had died on a Venezuelan crew launch on inland Venezuelan waters, which the vessel in question never left. The Court specifically found the only contact with the United States was ownership of the launch by a United States corporation which since the 1920's had operated exclusively within the country of Venezuela. Plaintiffs in the case conceded that Venezuela was the most convenient forum for the case to be tried. It is not readily apparent to respondents that the issues in that case have any significant relationship to the issues presented in the case at bar. In *Morewitz v. Andros Compania Maritima, S.A.*, 614 F.2d 379 (4th Cir. 1980), the case was likewise inapposite to any issue presented in the case at bar. In that case, there was absolutely no evidence presented giving rise to a factual finding of base of operations in the United States nor the deriving of substantial revenue from United States trade, and in fact the only jurisdictional claim made by plaintiff was that he had a valid wage claim under United States law.

Although *Fitzgerald v. Liberian S/T CHRYSSI P GOULANDRIS*, 582 F.2d 312 (4th Cir. 1978), factually

involved a single United States contact being the place of execution of a contract, the case with regard to the issue presented herein is entirely consistent, and in fact was cited by the Court of Appeals below. In *Fitzgerald, supra*, the Court of Appeals for the Fourth Circuit reviewed the record in light of the findings of fact by the Trial Judge, and held that his analysis of the finding concerning base of operations would not be disturbed under the "clearly erroneous" standard.

Therefore, the conflicts perceived by petitioners are nonexistent, and the Petition should be denied.

VII.

Certiorari Should Be Denied In This Case Because The Peculiar Facts Herein Would Warrant The Application Of United States Law In Any Event Pursuant To Either Greek Or Liberian Legal Principles And This Case Is Thereby An Inappropriate Vehicle With Which To Analyze The Issues Presented.

The case at bar comes before the Court in a unique procedural framework, there having been conducted a full trial on the merits which included the presentation of expert testimony on the issue of foreign law. The petitioners did not utilize the provisions of either 28 U.S.C. §1292(a)(3) or 28 U.S.C. §1292(b) in order to have the issue of jurisdiction settled prior to a full trial

on the merits. At the trial on the merits, respondents presented the expert testimony of Professor A. N. Yiannopoulos, head of the Department of Admiralty of Tulane University in New Orleans, Louisiana. Both the testimony of Professor Yiannopoulos and the circumstances of the case at bar indicate that the United States substantive law would have been applied in this controversy even had the Trial Court not found facts sufficient for the direct application of United States law by virtue of petitioners' base of operations in the United States and substantial source of income derived from United States trade.

Professor Yiannopoulos testified as an expert in the field of Greek law and foreign and comparative law, and concluded that under Greek conflict principles United States law would have been applied to the case at bar in any event. [R. 76]. Professor Yiannopoulos testified that the principle of *lex locus delicti* is recognized in Greece and applies in maritime situations, and further testified that the law of the flag principle is only applicable in Greece to controversies involving real rights on a vessel, as opposed to personal injuries. [R. 77].

Professor Yiannopoulos testified that a seaman in Greece has an option of bringing an action *ex delicto* for tort against his employer or pursuing his workman's compensation remedy. [R. 80]. Professor Yiannopoulos testified that if the action were pursued by a sea-

man *ex delicto*, and "if there was a tort occurring in a foreign country, the Greek Court would be applying the law of that country under the rule of conflict of law that is in the Civil Code." [R. 79]. The law of the place of injury, of course, in this case, is the United States. The testimony of Professor Yiannopoulos was unrebutted by the testimony of petitioners' expert in Greek law, Mr. Nicholas Domvros. Thus, after trial with expert testimony on the subject, petitioners can find no comfort with the application of United States law pursuant to the principles of Greek law.

Other options with regard to the application of foreign law open to the Trial Court in this case were possibly either the law of Liberia or that of Panama. The law of Liberia encompasses the general maritime law applied in the United States of America. *See, e.g., Perez v. Omnium Trader*, 174 F.Supp. 876 (D.C. La. 1959). While there was no expert testimony offered as to the applicability *vel non* of either the law of Liberia or that of Panama, the procedure utilized in the United States District Courts is to assume the similarity of foreign law to that of the law of the United States after disposition of jurisdictional questions in absence of proof to the contrary. Gilmore and Black, *The Law of Admiralty*, 478 (2d ed. 1975) states:

> The reported cases suggest that our courts, at least in this context, are willing to assume that the maritime law of most foreign countries is

> the same as the maritime law of the United States. Thus, unless counsel for defendant is in a position to prove the contrary, the court's decision to apply the law of Greece or Norway or Hong Kong can be tantamount to a decision that the plaintiff is entitled to relief under the maritime law of the United States.

In the case of *Kearney v. Savannah Foods and Industries, Inc.*, 350 F.Supp. 85 (S.D. Ga. 1972), a District Court specifically addressed the problem of proving foreign law, and stated:

> Foreign law is not judicially noticed by Federal Courts. It must be pleaded and proven. Benedict on Admiralty, §382. In absence of proof, the controlling law is that of the forum.[12]

On appeal, and out of an abundance of caution, respondents argued that even if the Trial Court was incorrect in applying United States law to this controversy by virtue of its findings of fact with regard to petitioners, nevertheless a Greek Court would apply United States law to this controversy on the basis of its firmly entrenched rule that the law of the place of the tort governs. The Court of Appeals below specifically deferred judgment on this issue[13] in light of its holding

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12 350 F.Supp. 89 [citations omitted].

13 628 F.Supp. 318.

which is the subject of this Petition. Inasmuch as United States law from the face of the record would apparently apply to this controversy after a full trial on the merits in any event, respondents respectfully suggest to the Court that the case at bar is less than an appropriate vehicle for this Court to further discuss the principles of *Lauritzen, supra, Romero, supra,* and *Hellenic Lines, Ltd., supra.*

Accordingly, certiorari ought be denied.[14]

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in the case below was very simply strictly limited to a finding that the Trial Court was not clearly erroneous in its findings of fact that petitioners maintained a substantial base of operations in the United States and derived substantial revenue from United States trade, freight

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14 Nevertheless, petitioners inexplicably ask that this court find Greek law applies to this controversy and transfer this matter to a Greek Court (presumably for the application of United States law) on *forum non conveniens* grounds. [Petition, p. 21, note 11]. This extraordinary request on the part of petitioners comes after a complete and extensive trial on the merits, including the presentation of fact and expert testimony by all parties, and after petitioners themselves participated in the taking of trial depositions in the Republic of Greece, all without petitioners ever attempting to utilize either statutory or extraordinary review procedures for the *forum non conveniens* determination made in advance of trial. *See, e.g., Gkiafis v. S/S YIOSONAS,* 387 F.2d 460 (4th Cir. 1967) and *Conte v. Flota Mercante,* 277 F.2d 664 (2nd Cir. 1960).

and charter hire such that the application of United States law could be made pursuant to *Hellenic Lines, Ltd., supra.* Despite allegations to the contrary, petitioners' dispute in this entire case is a factual one, having disagreed with the findings of fact made by the Trial Court based on all of the evidence presented. Petitioners have carried their factual dispute to the Court of Appeals for the Fifth Circuit, and now, purely and simply, attempt to argue their factual dispute for a third time before this Court. The decision of the Court of Appeals below, addressing itself to the very special fact situation of this case, neither conflicts with the decisions of this Court, the decisions of the Fifth Circuit, nor the decisions of any other Court of Appeals. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to United States Supreme Court Rule 28.3, all counsel of record herein have been served with three (3) copies each of this Opposition to the Petition by depositing the same in the United States mail, first class postage prepaid, properly addressed to counsel, at their office address.

PAUL H. DUE'

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 80-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALMAS BROTHERS SHIPPING, S.A.
AND VALSKY MARITIME, LTD.,
Petitioners

v.

JACK FISHER, ETC. AND
EUGENIA KEPESSIDIS, Individually, Etc.,
Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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A few brief replies to some of the contentions in the Brief in Opposition may be helpful to the Court.

I. The Petition Presents A Legal Issue

Not unexpectedly, Respondents would convert the Petition for Certiorari into an attempt by Petitioners to have the Court review a "fact issue" already resolved against

them by the courts below. (Brief in Opp. p. 5-9). Such is not the case—the issue is clearly one of law! Taking all of the facts as "found" by the courts below with respect to the shipowner's activities in the United States,[1] it is a question of law whether the shipowner has thereby established a "substantial base of operations" under the rule of law established by the Court in *Rhoditis,* 398 U.S. 306 (1970). The fact that the lower courts may phrase their conclusions of law in terms of a "finding of fact," e.g., "seaworthiness," or "base of operations," does not prevent this Court from reviewing the interpretation placed by the lower courts on this Court's cases defining these legal terms.

The Petition here presents precisely the same type of reviewable legal issue as the one before the Court in *Usner v. Luckenbach Overseas Corporation,* 400 U.S. 494 (1971); i.e., this case involves the Court's definition of the term "substantial base of operations," while *Usner* involved the Court's definition of the term "unseaworthiness." In *Usner* the Court of Appeals below had held that a single negligent act by a fellow longshoreman could not render a ship seaworthy. After a brief review of the Court's seaworthiness decisions of the prior 25 years, Justice Stewart stated the issue before the Court quite succinctly:

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1. Even those which are unsupported by any evidence, such as, the shipowner derived substantial revenue from this vessel's only voyage to the United States. The only evidence on the issue shows the Charter Party (hiring of the ship) was executed in London, England for one trip only from the United States to Russia. The revenue (Charter Hire) from this one trip was to be paid to the Greek shipowners at their bank in Piraeus, Greece by the Panamanian corporation who had chartered the vessel. (App. p. 116-117, Exhibit Valmas #1, Time Charter, lines 12-14, 58-64)

". . . For the question here goes to the very definition of what unseaworthiness is and what it is not." 400 U.S. 494, at 498.[2]

The present Petition "goes to the very definition of what" a substantial base of operations "is and what it is not" under *Rhoditis.*

Petitioners here seek the same *Usner* type of review of the conclusion of law of the lower courts that Petitioners had a "substantial base of operations in the United States" under the criteria set out by this Court in *Rhoditis.* This Court has not only the power, but the obligation, to see

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2. This was not a new concept, but simply reaffirmed what the Court had held reviewable in at least three earlier cases:

1. In *Mahnich v. Southern S.S. Co.,* 321 U.S. 96 (1944), both of the lower courts held that a vessel having a defective rope on a staging, when other sound rope was available for use by seamen, was seaworthy. While recognizing that a finding of seaworthiness is usually a finding of fact, but because both courts below had so held as a matter of law based on this court's decision in *The PINAR DEL RIO,* this Court held that the lower courts' holding that the staging was seaworthy despite the defective rope was a "conclusion of law" that was reviewable by this Court. 321 U.S. 96, at 99.

2. In *Morales v. Galveston,* 370 U.S. 165 (1962), both of the lower courts held that a vessel was seaworthy. This Court granted certiorari to determine whether the introduction of a noxious substance from a source outside the ship, which the ship could not foresee, could as a matter of law, render the ship unseaworthy. This Court affirmed the conclusion of law by the lower courts that the vessel was seaworthy only because the lower courts had reached this conclusion "under proper criteria" from this Court's earlier decisions. 370 U.S. 165, at 171.

3. In *Waldron v. Moore-McCormack Lines,* 386 U.S. 724 (1967), certiorari was granted to determine whether assigning too few men to do a particular task made the vessel unseaworthy, after both the lower courts had concluded as a matter of law that it did not. This Court reversed and held that if the jury found as a fact that too few men were assigned to do the job, the correct conclusion of law would be that the vessel was unseaworthy.

that the lower courts have properly interpreted and applied its decisions in the *Lauritzen-Romero-Rhoditis* trilogy.[3]

That the courts below have not followed the trilogy and particularly *Rhoditis* is virtually conceded, for Respondents again decline the invitation to give both the Court and Petitioners the record citations to the evidence on which the courts below relied in concluding that Petitioners had a substantial base of operations in the United States. Obviously, this is because there is no such evidence. (Pet. for Cert. p. 9)[4]

II. Contract Is Enforceable And Petitioners Subject To Suit In Greece

Respondents assert the contract of employment requiring this action to be brought in Greece is not enforceable because not negotiated at arm's length. (Brief in Opp. p. 10-11) Aside from there being no evidence to support this assertion, the employment contract executed by the

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3. Please see full discussion in Petition for Certiorari, pages 5 to 10.

4. In its Petition for Rehearing in the Court of Appeals, Petitioners invited both Respondents and the panel of the Court of Appeals below to find any such evidence in the record as the Panel's decision did not cite any record references either. As the dissent filed upon the refusal to rehear the case en banc shows, the dissenting judges, like Petitioners, could not find such evidence either. (App. p. 30) In fact, Respondents further compound their misrepresentations when they assert Petitioners had hired two separate agents while the vessel was in Beaumont at the time of the casualty, again without any record citations where the alleged testimony from Petitioners can be found. What the evidence actually shows is that Petitioners' representative testified that he did not know whether the agent in Beaumont was one employed by the owners or one employed by the charterers. While the owners may have had one agent, it is clear it did not have two, and may even have had none! (App. p. 114)

Greek seaman in Piraeus, Greece expressly made the Collective Agreement between the Union of Greek Shipowners and the Panhellenic Seamen's Federation applicable to the decedent's employment aboard the vessel. And obviously the courts of the United States cannot take judicial notice that a collective bargaining agreement between management and a labor union has been entered into at less than arm's legnth.

In any event the Court has already held in *Lauritzen*, 345 U.S. 571, at 588-589 (1953), that such contracts are not against public policy, and there is no just reason why they should not be enforced.

The attempt, without any record citations to support it, to make the contract irrelevant on the grounds that the Petitioners are not subject to suit in Greece is unavailing and all of the evidence is to the contrary. The Petitioners all are owned, operated and managed from Greece, the vessel flies the Greek flag, and it is basic hornbook law that a corporation is subject to suit wherever it does business.[5] We reiterate here for the Court's convenience foot note 2 from our Petition for Certiorari, as it summarizes the evidence on this issue:

> "2. In footnote 15, page 272, the panel apparently gives some credence to plaintiffs' claim that a Greek forum is not available to the plaintiffs. The plaintiffs' Greek law expert (also counsel for plaintiffs in this case) testified they could have received compensation under Greek law 551 or elect to proceed in tort in Greece (T/P pp. 78-80). Defendants' legal expert

5. Companies doing business in Greece must appoint an agent for process. See Martindale, Hubbell Law Dictionary, 1981, Vol. VIII, Law Digests, Greek Law Digest, p. 3683.

also testified that the plaintiffs had these remedies available in courts of Greece (Domvros Dep. p. 21)." (Pet. for Cert., p. 7)

III. American Law Not Applicable In Greece

The Respondents contend that even if this action is tried in Greece that the Greek courts would apply American law and not Greek law. (Brief in Opp. p. 20-22) They rely upon the testimony of Professor Yiannopoulas, who is an attorney of record for Respondents, and named in a power of attorney from Mrs. Kepessidis as one of her legal representatives. Professor Yiannopoulas did not testify as the Respondents represent. The record reflects that he was specifically asked on direct and cross-examination, whether he was telling the district court that a Greek court would apply American law to this case. On direct examination by Respondents' attorney, he testified as follows:

> "Q. So, in substance, what that means in relation to this particular accident which occurred in Beaumont, what law would be applicable?
> A. I would prefer not to answer the question as specific as to this particular case. . . ." (T/P p. 78)

To be certain that the record clearly reflected that Professor Yiannopoulas was not testifying that American law would be applied if the suit was in Greece as Respondents now contend, this was his testimony on cross-examination by Petitioners' attorney:

> "Q. So then you are saying to us as you understand the Greek law if the beneficiaries of these Greek seamen had filed suit for his death in the courts

in Greece, that the Greek law would require the Greek court to apply the laws of the United States, because that's where the death occurred?

A. No, I am not saying that. That's why, you see, I was very careful when the counselor was asking on direct examination that I did not speak about a particular case before on this question. . . ." (T/P p. 111)

A more categorical denial of Respondents' contention that United States law would be applied by the Greek courts if the action was filed in Greece is difficult to imagine.

IV. Greek Law Was Proven And American Law Not Applicable

The Respondents next apparently contend that the law of the United States is to be applied because a different foreign law was not pleaded and proven. (Brief in Opp. p. 22, 23) This principle has no application to this case as Petitioners proved the law of Greece by taking the deposition in Greece of Mr. Nicholas Domvros, an attorney at law experienced in the law of Greece relating to personal injury and death claims by seamen and their beneficiaries. This was done because the trial court did not rule until the conclusion of the trial on the merits that American law was applicable. (App. p. 68, 69)

V. Petitioners Had No Remedies By Which It Could Obtain Earlier Ruling

Respondents suggest that because there has been a full trial on the merits and Petitioners did not utilize two sections of the United States Code to have the jurisdictional issue decided by the trial court before the trial

they should not now be heard. (Brief in Opp. p. 20) Neither section of the Code was available to Petitioners.

Section 1292(a)(3) of Title 28 was not available because it permits an appeal only from interlocutory decrees of the district courts which determine the rights and liabilities of the parties which the District Court's order did not do. (App. p. 48)

Section 1292(b) of Title 28 provides that an appeal can be taken from an order otherwise not appealable, if the district judge is of the opinion that it involves a controlling question of law. Petitioners specifically asked the district court, at the hearing on its Motion to Dismiss, whether the court would entertain an interlocutory appeal on the jurisdictional issue and were advised that the court would not approve an interlocutory appeal. Petitioners therefore did not have this remedy either.

In this same vein Respondents attempt to create the impression that our request that once Greek law has been held applicable that the action be dismissed for refiling in Greece is being made for the first time in footnote 11 on page 21 of our Petition (Brief in Opp. p. 24, footnote 14). Nothing could be further from the truth as this is precisely what we have been trying to get both of the lower courts to do almost since the day the suit was filed. The very first pleading filed by Petitioners only 21 days after suit was filed sought precisely such relief.[6] Petitioners

6. Suit was filed on June 28, 1976 and Petitioners' First Motion to Dismiss and to require the action to be filed in Greece was filed approximately 21 days later, on or about July 19, 1976. The two cases cited by Respondents (Brief in Opp. p. 24, footnote 14) are inapplicable as both involved long delays in seeking such relief—one involved a 16-months delay and the other involved such a request on the eve of trial. No such delay is involved here.

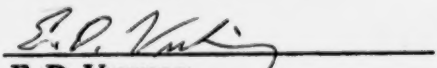
are also painfully aware that substantially all of the evidence in this case had to be taken in Greece because, in addition to paying its own attorney's expenses to Greece, the District Court made Petitioners pay the expenses of the attorneys for the Respondents (none of whom came to the trial in the United States) and those of the court reporter from Houston, Texas as a condition of Petitioners being permitted to take the depositions.[7] Petitioners seek in this Court precisely what they have always sought, and we submit, have been wrongly denied, in both of the courts below. Petitioners have done everything possible to avoid being here on the jurisdictional and choice of law issues both before and after the trial on the merits and, we respectfully submit, should be heard.

7. It is obvious that upon any retrial under Greek law, the Greek courts are the proper forum. Any evidence needed in addition to that already in the record will have to be obtained in Greece, and not in the United States.

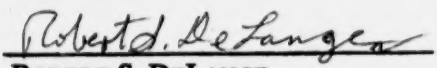
CONCLUSION

Petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



E. D. VICKERY



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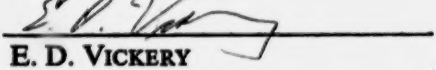
CERTIFICATE OF SERVICE

This is to certify that three copies of this Petitioners' Reply Brief have been served on all parties required to be served, i.e., on Respondents, by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record, in accordance with Rule 28.3, as follows: Mr. Paul Dué, of Dué, Dodson & deGravelle, 442 Europe Street, Baton Rouge, Louisiana 70802 and Mr. Frank A. Adams, of Adams & Adams, 2372 Calder Ave., Beaumont, Texas 77702, on the 29th day of July, 1981.



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